PART I – INTRODUCTION

I-A. Introductory comments

[1] These submissions are provided to assist the Senate's Legal and Constitutional Affairs Legislation Committee with its scrutiny of Whistleblower Protection Authority **Bill** 2025 (No 2).

[2] The scope of the Bill is sweeping, and I cannot hope to adequately address every aspect of the Bill.

[3] These submissions will focus on a few issues about which I will be able to offer relatively detailed commentary.

[4] Broadly speaking, three key issues will be addressed in these submissions. Those issues are:

> a) the conceptual breadth of a *whistleblower protection issue*, defined in subsection 8(1) of the Bill, and the implications of the breadth of that concept (particularly with respect to the role of the Office of the Commonwealth Ombudsman); and
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> b) the proposed immunities, set out in Part 4, Division 3 of the Bill, of staff members and persons assisting the Whistleblower Protection Authority (**WPA**); and
>
> c) the remuneration of staff members of the proposed WPA, and the scope of the WPA's role.

[5] Having addressed the three key issues, I will address a miscellaneous issue, and suggest that more modest reforms be considered and effected, in anticipation of root and branch reforms across the Commonwealth's legislative landscape relating to whistleblowing.

I-B. Summary of layout and content of submissions

[6] The conceptual breadth of a *whistleblower protection issue* will be addressed in part II of these submissions.

[7] In addressing the conceptual breadth of a *whistleblower protection issue*, I will draw attention to the institutional implications of the definition. In particular, attention will be drawn to the role of the Commonwealth Ombudsman, and the implications of the definition of the a *whistleblower protection issue* on the Ombudsman's role.

[8] The proposed immunities, set out in Part 4, Division 3 of the Bill, of staff members and person assisting the WPA will be addressed in part III of these submissions.

[9] The remuneration of staff members of the proposed WPA, and the scope of the WPA's role, will be addressed in part IV of these submissions.

[10] After setting out a brief comment in part V, I will set out alternative proposals for reform in part VI.

I-C. Analysis of the issues in the light of evidence of whistleblower action

I-C1. Case studies

[11] The analysis of the issues identified in paragraph [4] of these submissions will primarily be informed by two case studies of past whistleblower action.

[12] Case studies of:

a) the investigation of Professor Peter Tregear's public interest disclosure while he was at the Australian National University; and

b) the public interest disclosure investigation, conducted by Ms Kate McMullan of the Australian Public Service Commission, into allegations of unlawful recruitment or promotion decisions made in respect of registrars of the Federal Court of Australia,[1]

will be relied on.

[13] Both:

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1 There are now many documents published on the freedom of information disclosure logs of Federal Court of Australia, the Office of the Commonwealth Ombudsman, the Attorney-General's Department and the Australian Public Service Commission about the investigation of the public interest disclosure, by Kate McMullan, into allegations of unlawful recruitment and promotion decisions made by administrators of the Federal Court of Australia in respect of registrars of that Court (APSC reference – PID 2020 400006). A sample of documents disclosed is set out below:

Attorney-General's Department

FOI23/547 - https://www.ag.gov.au/node/6506

Office of the Commonwealth Ombudsman

FOI-2025-80009 - https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/317470/FOI-2025-80009.pdf

Australian Public Service Commission

LEX 1151 - https://www.apsc.gov.au/sites/default/files/2024-11/LEX%201151%20%26%201204%20-%20Document%201.pdf

LEX 1096 - https://www.apsc.gov.au/sites/default/files/2024-08/LEX%201096%20-%20Document.pdf

A further sample of documents, released under the *Freedom of Information Act 1982* (Cth), on the manner in which the public interest disclosure was investigated by Kate McMullan, and the subsequent investigation of the complaint about a mishandled public interest disclosure investigation, has been published on *Right to Know Australia* and the *Internet Archive*:

APSC: LEX 880 - https://www.righttoknow.org.au/request/10558/response/35251/attach/15/LEX%20880%20Document%20bundle%20with%20redactions.pdf?cookie_passthrough=1

APSC: SHC22-506 - https://www.righttoknow.org.au/request/9867/response/31994/attach/14/Questions%20on%20notice%20Estimates.pdf?cookie_passthrough=1

Ombudsman: FOI-2021-10120 - https://archive.org/details/pid-2020-400006-december-2020-kate-mc-mullan-report-issued-under-s-51-of-the-pid

Ombudsman: FOI-2021-10120 - https://archive.org/details/pid-2020-400006-october-2021-2021-104592-caitlin-wu-complaint-to-commonwealth-om

Ombudsman: FOI-2021-10120 - https://archive.org/details/pid-2020-400006-october-2021-2021-104592-rohan-muscat-complaint-to-commonwealth-

Ombudsman: FOI-2023-10045 - https://archive.org/details/pid-2020-400006-2022-12-12-2021-104592-mark-anstey-foi-2023-10045-decision-to-ab

Ombudsman: FOI-2023-10101 - https://archive.org/details/pid-2020-400006-2023-03-23-2021-104592-response-to-mark-anstey-three-page-summar

a) the investigation of Professor Peter Tregear's public interest disclosure while he was at the Australian National University; and

b) the public interest disclosure investigation, conducted by Ms Kate McMullan of the Australian Public Service Commission, into allegations of unlawful recruitment or promotion decisions made in respect of registrars of the Federal Court of Australia,

were the subjects of complaints to the Office of the Commonwealth Ombudsman.[2]

[14] Copies of the decisions of investigation prepared by the Commonwealth Ombudsman's delegates are annexed to these submissions.

I-C2. The availability of relevant evidence to the Senate's Legal and Constitutional Affairs Legislation Committee for its consideration of the Bill and its consequences

[15] The submissions I will advance are based on information about two whistleblower disclosures, made under the *Public Interest Disclosure Act 2013* (Cth), available to me. That is, admittedly, a tiny sample set.

[16] Sadly, on account of oppressive statutory secrecy and confidentiality regimes, there is likely to be a dearth of evidence available to the Senate's Legal and Constitutional Affairs Legislation Committee about the way that whistleblower disclosures are actually dealt with.

[17] I point this out because the Committee has been, in effect, tasked with assessing a Bill about how whistleblowers and their disclosures are dealt with without having access to a comprehensive and objective base of evidence of the way in which whistleblowers and their disclosures are actually dealt with by federal agencies and corporations.[3] That is quite the handicap, and it ought to be explicitly acknowledged.

[18] That said, I take for granted that the Committee's deliberations of the Bill ought to be informed by evidence and, limited though it is, two case studies are better than no evidence.

Ombudsman: FOI-2023-10101 - https://archive.org/details/pid-2020-400006-2023-03-10-2021-104592-office-of-the-commonwealth-ombudsman-requ

The investigation of the public interest disclosure, by Kate McMullan, into allegations of unlawful recruitment or promotion decisions made by administrators of the Federal Court of Australia in respect of registrars of that Court has also been the subject of enquiries during Senate Estimates, as well as the subject of questions on notice (see, for example, questions on notice put to the Federal Court of Australia by Senator Shoebridge at additional estimates on 26 February 2024: https://archive.org/details/pid-2020-400006-2024-05-17-lcc-ae-24-217-mr-b-rohan-muscat-legal-and-constitutio).

2 The Ombudsman's matter reference for the complaint into the mishandling of Prof Tregear's public interest disclosure investigation is 2019-402149. The complaint was investigated, under the *Ombudsman Act 1976* (Cth), by the Commonwealth Ombudsman's delegate, Ms Cassandra Hodzic.

The Ombudsman's matter reference for the complaint into the mishandling of the public interest disclosure investigation into allegations of unlawful recruitment or promotion decisions made in respect of registrars of the Federal Court of Australia is 2021-104592. The complaint was investigated, under the *Ombudsman Act 1976* (Cth), by the Commonwealth Ombudsman's delegate, Mr Mark Anstey.

3 Disclosures of information for the purposes of Part 9.4AAA of the *Corporations Act 2001* (Cth), while being covered by the Bill, are beyond the scope of these submissions. I would caution against the apparent assumption of the Bill that a single framework for whistleblower protections is justified in respect of whistleblowers in the public sector and whistleblowers in the private sector. While there is considerable overlap, the rationales for private sector whistleblowing are not identical to the rationales of public sector whistleblowing. The consequences of unlawful conduct within the Commonwealth government have, in many respects, different implications when compared with unlawful conduct within private sector corporations. Importantly, the civic implications of the former differ from the latter, because there is an essential qualitative difference between the state and its mode governance, on the one hand, and corporations operating in a market economy according to laws made by the state, on the other.

PART II – THE CONCEPTUAL BREADTH OF A WHISTLEBLOWER PROTECTION ISSUE AND ITS IMPLICATIONS

II-A. Definition of a *whistleblower protection issue*

[19] A *whistleblower protection issue* is defined as:[4]

> a) either an act or omission:
>
> > i) constituting reprisal; or
> > ii) constituting victimisation; or
> > iii) which causes detriment to any person,
>
> as a result of that person or any other person making a disclosure of wrongdoing under a Commonwealth law to which the Bill applies; or
>
> b) a failure of any person to fulfil *whistleblower protection responsibilities* in respect of a disclosure of wrongdoing, in circumstances where the failure:
>
> > i) has led; or
> > ii) will lead; or
> > iii) is likely to lead,
>
> to detriment or harm to any person.

[20] Moreover:

> a) an allegation; or
>
> b) a reasonable suspicion; or
>
> c) information,

relating to the relevant act or omission, or failure, constitutes a *whistleblower protection issue*.[5]

II-B. The functions of the Whistleblower Protection Commissioner

[21] Amongst other things, the functions of the Whistleblower Protection Commissioner include:

> a) to manage, oversee or review, in appropriate circumstances, the manner in which Commonwealth agencies investigate or deal with disclosures of wrongdoing, in respect of whistleblower protection issues;[6] and
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> b) to do anything incidental or conducive to the performance of the function of managing, overseeing or reviewing, in appropriate circumstances, the manner in which Commonwealth

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4 Bill, s 8(1). The definition of a *whistleblower protection issue* presupposes a knowledge of the meanings of *whistleblower protection responsibilities* and a *disclosure of wrongdoing* for the purposes of the Bill. The meanings of *whistleblower protection responsibilities* and a *disclosure of wrongdoing* are defined in subsection 8(1) of the Bill.

5 Ibid.

6 Ibid, s 10(1)(f).

agencies investigate or deal with disclosures of wrongdoing, in respect of whistleblower protection issues.[7]

II-C. The role of the Commonwealth Ombudsman

II-C1. The historical and current role of the Commonwealth Ombudsman in considering complaints about the manner in which a disclosure investigation has been conducted

[22] I take for granted that the Committee is aware that, since the *Public Interest Disclosure Act 2013* (Cth) came into effect, a person aggrieved by the manner in which a disclosure investigation has been conducted (following its allocation for investigation) has had a right to apply to the Office of the Commonwealth Ombudsman with a view to the Commonwealth Ombudsman considering the manner in which the investigation was conducted pursuant to the terms of the *Ombudsman Act 1976* (Cth).[8]

[23] I also take for granted that the Committee is aware that, since the *Public Interest Disclosure Act 2013* (Cth) came into effect more than a decade ago, the Ombudsman's powers under the *Ombudsman Act 1976* (Cth) have extended to, amongst other things:

a) commencing a preliminary inquiry to determine whether or not to investigate complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013* (Cth);[9] and

b) commencing investigations of complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013* (Cth);[10] and

c) under penalty of fine or imprisonment,[11] compelling the production of information or documents or records relevant to complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013* (Cth);[12] and

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7 Ibid, s 10(1)(q).

8 On the Ombudsman's jurisdiction to consider complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation), please refer to *Ombudsman Act 1976* (Cth), s 5A.

The Ombudsman's website provides that the the Office of the Commonwealth Ombudsman has "a key role in overseeing and reporting on the operation of the PID scheme; promoting awareness and understanding of the PID Act; providing information to disclosers and agencies; [and] receiving and investigating complaints about the handling of public interest disclosures: https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing

For a more complete explanation of the Ombudsman's powers with respect to:

a) the consideration of complaints about the manner in which a disclosure investigation has been conducted prior to the reforms effected by the *Public Interest Disclosure Amendment (Review) Act 2023* (Cth), please refer to the *Agency Guide to the Public Interest Disclosure Act (Version 2)* <https://archive.org/details/office-of-the-commonwealth-ombudsman-agency-guide-to-the-pid-act-version-2 >; or

b) the consideration of complaints about the manner in which a disclosure investigation has been conducted following the reforms effected by the *Public Interest Disclosure Amendment (Review) Act 2023* (Cth), please refer to the *Agency Guide to the Public Interest Disclosure Act (Version 3)* <https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing/tools-and-resources >.

9 *Ombudsman Act 1976* (Cth), s 7A.

10 *Ombudsman Act 1976* (Cth), s 8.

11 *Ombudsman Act 1976* (Cth), s 36.

12 *Ombudsman Act 1976* (Cth), s 9. In the event of non-compliance with a notice to produce information, documents or records under section 9, the Commonwealth Ombudsman may also apply to the Federal Court of Australia for orders directing a person to comply with the notice. Failure to comply with the orders of the Court may constitute a

d) under penalty of fine or imprisonment,[13] instructing a person to appear before the Ombudsman for examination under oath or affirmation;[14] and

e) issuing reports, as well as recommendations, following an investigation.[15]

[24] The powers referred to under the *Ombudsman Act 1976* (Cth) are not limited to the Ombudsman's complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013* (Cth); they are general powers in respect of investigations conducted by the Ombudsman.[16]

[25] Since 1 July 2023, the powers available under section 15 of the *Ombudsman Act 1976* (Cth) have, in substance, been replicated within the *Public Interest Disclosure Act 2013* (Cth) in the form of section 55.[17] Thus, the Commonwealth Ombudsman has, since 1 July 2023, had a separate head of power under which he may consider complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013* (Cth), and issue such recommendations as he sees fit following the consideration of the complaint.[18]

II-C2. The expected role of the Commonwealth Ombudsman in considering complaints about the manner in which a disclosure investigation has been conducted should the Bill be enacted

[26] There is nothing in the Bill to suggest that, should the Whistleblower Protection Authority come into effect, the Commonwealth Ombudsman will be deprived of his jurisdiction to consider complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013* (Cth).[19]

[27] In the absence of provisions providing that the Commonwealth Ombudsman will be deprived of his jurisdiction to consider complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013*

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contempt of the Court.

13 *Ombudsman Act 1976* (Cth), s 36.

14 *Ombudsman Act 1976* (Cth), s 13.

15 *Ombudsman Act 1976* (Cth), s 15.

16 For example, the power to compel the production of documents, records or information was referred to by the Hon Catherine Holmes AC SC in her report about the Robodebt Royal Commission: see:

a) *Report – Royal Commission into the Robodebt Scheme*, Chapter 21, Part 2.2; and

b) *Report – Royal Commission into the Robodebt Scheme*, Chapter 21, Part 2.5; and

c) *Report – Royal Commission into the Robodebt Scheme*, Chapter 21, Part 4.

<https://robodebt.royalcommission.gov.au/publications/report >

The powers to compel the production of documents, records or information were not used during the Ombudsman's own motion investigations into the Robodebt scheme, and that failure was the source of apparent bewilderment, on the Royal Commissioner's part, during the Royal Commission. The Royal Commissioner criticised the Ombudsman's repeated failures to use powers of compulsion, which the Parliament had granted to him, in "circumstances [that] clearly warranted it": *Report – Royal Commission into the Robodebt Scheme*, Chapter 21, Part 4.

17 *Public Interest Disclosure Amendment (Review) Act 2023* (Cth), Schedule 1, item 34.

18 *Public Interest Disclosure Act 2013* (Cth), s 55(5). The powers under section 55 of the *Public Interest Disclosure Act 2013* (Cth) are characterised as "review" powers (see *Public Interest Disclosure Act 2013* (Cth), s 55(3)), though, in the light of the canons of statutory interpretation, there is, in my opinion, no reason to conclude that the "review" is *de novo* administrative review, and that the "review" is, in substance, the kind of "review" available under the *Ombudsman Act 1976* (Cth).

19 The Bill contemplates a continuing role for the Commonwealth Ombudsman in respect of whistleblower complaints. Consider, for example, Bill, ss 19(4) and 20(2)(b).

(Cth), I think it only fair to assume that the Commonwealth Ombudsman will retain his jurisdiction to consider complaints about the manner in which a disclosure investigation has been conducted (following its allocation for investigation) under the *Public Interest Disclosure Act 2013* (Cth) should the Bill be enacted.

II-D. The implications of having two Commonwealth authorities to lodge complaints with about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth)

II-D1. Forum shopping

[28] As already alluded to, the concept of a *whistleblower protection issue* in the Bill is quite broad.

[29] It extends to, amongst other things, an act or omission which causes detriment to any person as a result of that person or any other person making a disclosure of wrongdoing under a Commonwealth law to which the Bill applies.[20] Moreover, an allegation or a reasonable suspicion or information relating to the relevant act or omission, or failure, constitutes a *whistleblower protection issue*.[21]

[30] For example, an investigator denying a whistleblower procedural fairness during an investigation under the *Public Interest Disclosure Act 2013* (Cth) comfortably falls within the definition of an act or omission that causes detriment to a person who has made a disclosure of wrongdoing under the *Public Interest Disclosure Act 2013* (Cth), which is an act to which the Bill applies.[22]

[31] A failure on the part of an investigator to afford a whistleblower with procedural fairness during an investigation under the *Public Interest Disclosure Act 2013* (Cth) would also give an aggrieved whistleblower the right to lodge a complaint with the Commonwealth Ombudsman.

[32] In effect, a whistleblower would have the option of choosing which authority he or she would like to lodge a complaint with. Is this an intended feature of the Bill?[23] If so, it would, in my opinion, be

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20 Bill, s 8(1).

21 Ibid.

22 Refer to the definition of a *disclosure of wrongdoing* in s 8(1) of the Bill.

23 The reputation of the Office of the Commonwealth Ombudsman has, even in a charitable light, taken a severe battering in light of the revelations of the Robodebt Royal Commission.

I have doubts about that reputation being rebuilt anytime soon.

There is good reason to question whether the gut wrenching revelations, during the Robodebt Royal Commission, about the failures of officials in the Office of the Commonwealth Ombudsman have been sources of genuine self-reflection for the Commonwealth Ombudsman and his staff.

A few days before the report of the Royal Commission into the Robodebt Scheme was provided to the Governor-General (the report was provided to the Governor-General on 7 July 2023), Mr Iain Anderson, the current Commonwealth Ombudsman, sent a message to his staff members. In that missal, Mr Anderson stated that the failure of investigators to comment on the unlawfulness of the Robodebt scheme was "not a reflection on the Office's staff who carried [the] investigations" (emphasis in the original): https://archive.org/details/2023-07-04-commonwealth-ombudsman-iain-hugh-cairns-anderson-foi-2023-10082-robod

It is hard to believe that, after all that was publicly aired during the Royal Commission, the Commonwealth Ombudsman would dare claim that the failures of the staff members who conducted the investigations did not reflect on those officials.

One need only read Chapter 21, parts 3.1 – 3.2 of the *Report – Royal Commission into the Robodebt Scheme* to find the less sympathetic views of Royal Commissioner Holmes.

Reflecting on Rick Morton's *Mean Streak*, Professor Andrew Podger AO, a former Australian Public Service Commissioner, took the time to single out Iain Anderson's "message to staff days before the commission released its report, [in which Iain Anderson] tried to massage the expected criticism by suggesting the failure to publicly

sensible to include a provision in the Bill noting that the rights of whistleblowers to lodge complaints about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth) under the Ombudsman Act 1976 (Cth) are not affected by the rights of complaint or referral to the Whistleblower Protection Commissioner set out in the Bill.

[33] Even if it is the intention of the drafters of the Bill to have two Commonwealth authorities to lodge complaints with about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth), what are the justifications for having two such authorities? For example, what are the implications of having having two authorities to which complaints about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth) from a productivity standpoint?

[34] Nothing in the explanatory memorandum sheds light on the justifications for having two Commonwealth authorities to lodge complaints with about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth), yet, I assume, questions about these justifications will be at the fore of minds of the parliamentarians considering the merits of the Bill.[24]

[35] It is beyond the scope of these submissions to analyse the economic implications of having two authorities to which complaints about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth). It is also beyond the scope of these submissions to consider *all* of the legal implications of having two such authorities. Nevertheless, some of the legal implications of having two such authorities will be considered in the light of the case studies.

II-D2. Clashes in decisions of oversight authorities and inconsistent outcomes

II-D2.1. Introductory statements

[36] There is nothing in the Bill to suggest that, where the Commonwealth Ombudsman has, under the *Ombudsman Act 1976* (Cth), considered a complaint about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth), a whistleblower is precluded from drawing an act or omission, which causes detriment to that whistleblower following his or her making a disclosure of wrongdoing, to the attention of the Whistleblower Protection Commissioner.

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comment on the question of lawfulness 'is not a reflection on the office's staff ...'": Andrew Podger, 22 January 2025 "The APS must do more to address robodebt revelations: Review of Rick Morton's 'Mean Streak'", *The Mandarin*, <https://www.themandarin.com.au/284967-the-aps-has-more-work-to-do-the-address-robodebt-revelations-review-of-rick-mortons-mean-streak/ >.

Plainly, Mr Morton was not impressed by Mr Anderson's attempts to trivialise the failures of the investigators in his office.

If I were a whistleblower with a choice of forum, in the light of the revelations during the Robodebt Royal Commission and dubious statements made by the current Commonwealth Ombudsman about the culpability of his staff members, I would be less inclined to approach the Office of the Commonwealth Ombudsman to lodge a complaint about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth).

The point of these observations is that, if these revelations also factor in the minds of others, then it is likely that complaints will overwhelmingly be made to the Whistleblower Protection Commissioner, a body that does not have a troubled past and a battered reputation (do you remember the high hopes the Australian people had for the National Anti-Corruption Commission?). Naturally, the workload of the relevant complaint handling bodies will, or should, have funding implications. How will these funding implications be assessed?

24 Sadly, the merits of the statutes that bind the people of Australia are almost always secondary considerations when it comes to the enactment of laws. The foremost consideration in the lawmaking process is the sacred cow of party discipline (and its practical expression – voting along tribal lines).

[37] I noted earlier that a failure on the part of an investigator to, for example, afford a whistleblower with procedural fairness during an investigation under the *Public Interest Disclosure Act 2013* (Cth) comfortably falls within the definition of an act or omission that causes detriment to a person who has made a disclosure of wrongdoing under the *Public Interest Disclosure Act 2013* (Cth), which is an act to which the Bill applies.

[38] Under the provisions of the Bill, it seems perfectly legitimate for a person who has approached the Commonwealth Ombudsman with a complaint about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth) to also approach the Whistleblower Protection Commissioner with a whistleblower protection issue wherein an act or omission on the part of a decision maker under the *Public Interest Disclosure Act 2013* (Cth) causes detriment to the whistleblower.

[39] I turn to the case study of the investigation of Professor Peter Tregear's public interest disclosure while he was at the Australian National University to illustrate the legal implications of this observation.

II-D2.2. The essentials of Ms Cassandra Hodzic's investigation, under the *Ombudsman Act 1976* (Cth), of Professor Peter Tregear's complaint about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth)

[40] On 21 September 2020, Ms Cassandra Hodzic, a delegate of the Commonwealth Ombudsman wrote to Professor Peter Tregear OAM about the outcome of an investigation, under the *Ombudsman Act 1976* (Cth), into the manner in which a disclosure investigation was conducted, by officials contracted by the Australian National University, under the *Public Interest Disclosure Act 2013* (Cth).[25]

[41] The essentials of Ms Hodzic's investigation were:

> a) the Australian National University engaged an external investigator to investigate the substance of a public interest disclosure made by Professor Tregear under the *Public Interest Disclosure Act 2013* (Cth); and
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> b) a report was prepared by the investigator for the purposes of the *Public Interest Disclosure Act 2013* (Cth); and
>
> c) the report prepared by the investigator for the purposes of the *Public Interest Disclosure Act 2013* (Cth) was provided to Ms Hodzic upon her request;[26]
>
> d) the investigator included assessments about Professor Tregear's character in the public interest disclosure report, and that those assessments of character included that Professor Tregear was "untrainable" and that "he is a liar [and] a manipulator"; and
>
> e) Professor Tregear took exception to the inclusion of those adverse assessments of character in the public interest disclosure report, and raised the inclusion of those adverse character assessments as a ground of complaint; and
>
> f) Ms Hodzic "requested additional information from the ANU to enable [the Office of the Commonwealth Ombudsman] to better understand what evidence the investigator considered in reaching particular conclusions, and if the investigator did not consider or give weight to certain material or allegations, why";[27] and

25 The investigation report is annexed to these submissions – see pages 66 – 67.

26 In the Ombudsman's investigation notice, Ms Hodzic states "[a]t our request, the ANU provided our Office with an unredacted copy of the report and records of witness interviews": see page 66 of these submissions.

27 Ibid.

g) despite issuing requests, "on a number of occasions between April and August 2020",[28] for the additional information to assist with Ms Hodzic's investigation, officials at the Australian National University "did not provide a response";[29] and

h) Ms Hodzic chose to advance consideration of Professor Tregear's complaint in the absence of the information requested from the Australian National University;[30] and

i) Ms Hodzic "formed the view that the investigation report [prepared by the ANU's investigator] did not adequately explain the basis for some of the investigator's finding";[31] and

j) despite claiming that she would "progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman]", Ms Hodzic claimed it was "difficult for [her] to be satisfied that the [ANU] investigator's findings were reasonably open" for the investigator to make on account of the ANU not complying with the Ombudsman's repeated requests for information.[32]

[42] Ms Hodzic terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in the light of the ANU's failure to respond to requests for information, she "did not think that further investigation would be likely to result in a different outcome for [Professor Tregear]".[33]

II-D2.3. An assessment of the essentials of Ms Cassandra Hodzic's investigation, under the *Ombudsman Act 1976* (Cth), of Professor Peter Tregear's complaint about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth)

[43] Several glaring errors leap out from the two page decision notice that Ms Hodzic provided to Professor Tregear.

[44] Parliament has explicitly provided the Commonwealth Ombudsman with the authority to *investigate* matters.[34]

[45] From the very inception of the Office of the Commonwealth Ombudsman,[35] as part of the investigative powers conferred on the Commonwealth Ombudsman, the Parliament granted the Ombudsman the power to *compel* a person to furnish information, or produce documents or other records, relevant to an investigation under the *Ombudsman Act 1976* (Cth).[36]

[46] In this instance, Cassandra Hodzic requested that officials in the ANU provide information in furtherance of the investigation commenced under section 8 of the *Ombudsman Act 1976* (Cth).[37] By her own admission, despite issuing requests, "on a number of occasions between April and August 2020", for information to assist with the investigation under the *Ombudsman Act 1976* (Cth), officials at the Australian National University "did not provide a response."[38]

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28 See pages 66 – 67 of these submissions.
29 See page 67 of these submissions.
30 In the Ombudsman's investigation notice, Ms Hodzic states "[i]n the circumstances, we decided to progress our investigation of your complaint based on the information available to us": see page 67 of these submissions.
31 See page 67 of these submissions.
32 In the Ombudsman's investigation notice, Ms Hodzic states "[a]s the ANU did not provide us with the additional information we requested, it was difficult for us to be satisfied that the investigator's findings were reasonably open": see page 67 of these submissions.
33 See page 67 of these submissions.
34 *Ombudsman Act 1976* (Cth), s 8.
35 Act No 181 of 1976.
36 *Ombudsman Act 1976* (Cth), s 9(1).
37 Presumably, Ms Hodzic was relying on subsection 8(3) of the *Ombudsman Act 1976* (Cth), which provides that "the Ombudsman may, for the purposes of this Act, obtain information from such person, and make such inquiries, as he or she thinks fit."
38 See page 67 of these submissions.

[47] It beggars belief that, in the face of such shameless disdain for the authority of the Office of the Commonwealth Ombudsman, the Ombudsman's delegate did not, following the refusal to comply with the request for information, *compel* the production of the information

[48] I am immediately reminded of the the Hon Catherine Holmes' criticisms of the Office of the Commonwealth Ombudsman in her report of the Royal Commission into the Robodebt Scheme. Specifically, the Royal Commissioner noted the following:[39]

> The responses to requests made for information in the 2017 own motion investigation warranted the use of the s 9 powers in the Ombudsman Act, particularly the associated power to examine on oath, to compel answers as to why the obvious inconsistencies and deficiencies in production of information were occurring and to require production of the documents which were so obviously missing.

[49] In the case of Robodebt, at least officials in the Department of Social Services feigned an interest in cooperating with the Office of the Commonwealth Ombudsman. Officials at the Australian National University did not even dignify Ms Hodzic's requests about the investigation of Professor Tregear's public interest disclosure with a response.

[50] How much more contumelious must the conduct of officials be in response to a request for information before the Commonwealth Ombudsman, or his delegates, decide to exercise the powers to compel the production of information or documents, particularly in the light of the Ombudsman's *investigative* role?

[51] That is not the worst of it.

[52] Ms Hodzic stated, in her reasons for decision, that, in the light of the failure of officials providing information in response to her requests, she would "progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman]."[40] But Ms Hodzic did no such thing.

[53] Rather than "progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman]", Ms Hodzic reasoned that:

> a) "it was unclear whether [Professor Tregear] had been given an opportunity to respond to" the "comments 'he is a liar, a manipulator' and 'untrainable' having been included in the investigation report"; and
>
> b) "[a]s the ANU did not provide us with the additional information we requested, it was difficult for us to be satisfied that the investigator's findings were reasonably open", and
>
> c) therefore, the investigation would be terminated because the delegate did "not think that further investigation would be likely to result in a different outcome."

[54] The inadequacies in Ms Hodzic's reasoning are glaring.

[55] Ms Hodzic did not "progress [the Ombudsman's] investigation of [the] complaint based on the information available to [the Ombudsman]." Had Ms Hodzic done so, she would have concluded that the evidence of the adequacy of the investigation was lacking, and, on the basis of the information before her, concluded that the investigation did not meet the requirements of procedural fairness.

[56] Instead:

39 *Report of the Royal Commission into the Robodebt Scheme*, page 581 <https://robodebt.royalcommission.gov.au/publications/report>.

40 See page 67 of these submissions.

a) Ms Hodzic claimed that the information before her was not sufficient for her "to be satisfied that the investigator's findings [about Professor Tregear being 'a liar', 'a manipulator', and 'untrainable'] were reasonably open" to be made; and

b) despite requesting information from the ANU under section 8 of the *Ombudsman Act 1976* (Cth), and having her request ignored repeatedly, Ms Hodzic *chose* not to exercise the powers that Parliament had explicitly granted to the Ombudsman and, by virtue of the authority to delegate that power, his delegates to compel the production of relevant information under section 9 of the *Ombudsman Act 1976* (Cth); and

c) on account of the dearth of information relevant to the *investigation* commenced under section 8 under the *Ombudsman Act 1976* (Cth), which was of Ms Hodzic's making given that it was well within her power to compel the production of the information (should it have existed), Ms Hodzic claimed that there was inadequate evidence for her "to be satisfied that the investigator's findings [about Professor Tregear] were reasonably open"; and

d) Ms Hodzic leapt to the conclusion that "further investigation would [not] be likely to result in a different outcome", thus justifying the termination of the investigation under section 12 of the *Ombudsman Act 1976* (Cth).

II-D2.4. Clashing officials

[57] I noted, in part II-D2.1, that there is nothing in the Bill to suggest that, where the Commonwealth Ombudsman has, under the *Ombudsman Act 1976* (Cth), considered a complaint about the manner in which a disclosure investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth), a whistleblower is precluded from drawing an act or omission, which causes detriment to that whistleblower following his or her making a disclosure of wrongdoing, to the attention of the Whistleblower Protection Commissioner.

[58] I think most reasonable people would agree that, in the scenario just set out, Professor Tregear was denied the opportunity to rebut the denigratory remarks made about him and included in the investigator's report [41, 42] The Commonwealth Ombudsman's delegate has, but for expressly recording the dreaded terms, apparently conceded that Professor Tregear was denied procedural fairness by the ANU's investigator.

[59] Since there is nothing in the Bill to suggest that, where the Commonwealth Ombudsman has, under the *Ombudsman Act 1976* (Cth), considered a complaint about the manner in which a disclosure

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41 It would be absurd if Professor Tregear were to have to *prove* that he was denied procedural fairness, it is insidious to require a person to *prove* something that has not occurred. If, upon compulsion, no evidence was produced that showed that Professor Tregear was given an opportunity to rebut the denigratory claims, an inference should have been drawn, by the investigator, that Professor Tregear was denied the opportunity to rebut those denigratory claims

42 The Australian National University's own *Procedure - public interest disclosure materials*, which are published on the University's website <https://policies.anu.edu.au/ppl/document/ANUP_006403>, explicitly set out, at paragraph 73 under the subheading "Procedural fairness", that "[w]here the investigator in preparing the report of their investigation proposes to,

> a) make a finding of fact, or
> b) express an opinion that is adverse to the discloser, to a Public Official who is the subject of the disclosure or to another person, the investigator or delegate must give the person who is the subject of that proposed finding or opinion a copy of the evidence that is relevant to that proposed finding or opinion and must give the person a reasonable opportunity to comment on it."

It would appear that, by the standards acknowledged in the Australian National University's own procedural materials, Professor Tregear was denied procedural fairness.

investigation is conducted under the *Public Interest Disclosure Act 2013* (Cth), a whistleblower is precluded from drawing an act or omission, which causes detriment to that whistleblower following his or her making a disclosure of wrongdoing, to the attention of the Whistleblower Protection Commissioner, it seems to me the be entirely appropriate for someone in the position of Professor Tregear to draw the fact that he as denied procedural fairness in the course of the ANU's investigation to the attention of the proposed Whistleblower Protection Commissioner. The grounds for drawing the denial of procedural fairness ought to be obvious there has been an omission or an act that has caused detriment to the whistleblower following the making of a disclosure under the *Public Interest Disclosure Act 2013* (Cth).

[60] I think most members of the Australian community would agree that a whistleblower in the position of Professor Tregear, who complained that he was denied an opportunity to rebut denigratory claims made about him and included in an investigation report, should be able to get effective redress from an oversight body The Commonwealth Ombudsman failed Professor Tregear, not the least because his delegate refused to exercise powers granted to the Ombudsman to compel the production of evidence from apparently contemptuous officials at the Australian National University, and it seems to me appropriate that the proposed Whistleblower Protection Commissioner provide the redress that the Commonwealth Ombudsman's official should have provided; the wording of the Bill provides as much.

[61] The real issue is the potential for two public officials, the Commonwealth Ombudsman and the Whistleblower Protection Commissioner, making inconsistent and opposing decisions in respect of complaints about the inadequacy of a public interest disclosure investigation based on the same matrix of facts [43]

[62] Has this consequence of the breadth of the concept of a whistleblower protection issue been considered by the drafters of the Bill? Is it an intended consequence? For my part, I do not think it sensible to have two integrity officials coming to inconsistent and opposing conclusions. That is not likely to inspire confidence in whistleblowers, public servants or the Australian community, and is more likely to undermine trust in government.

[63] Would it not be more appropriate, in such circumstances, to have an official, such as an inspector, to whom applications for review of decisions pertaining to complaints about inadequate public interest disclosure investigations of the Ombudsman, the IGIS, or their delegates, could be submitted on select grounds, such as:

> a) a failure to meet best practice in respect of making administrative decisions under relevant enactments; and/or
>
> b) a failure to exercise, without adequate justification, powers to compel the production of evidence or materials, particularly where the context of the complaint suggests that the exercise of such powers would be warranted; and/or
>
> c) acts or omissions of relevant officials being unreasonable, unjust, or oppressive in their effects, irrespective of whether the acts or omissions are lawful or unlawful; and/or
>
> d) unlawful conduct?

[64] I think that it would be more sensible to have an inspector with *oversight* of the operations of the Commonwealth Ombudsman in respect of his functions under, and in relation to, the *Public Interest Disclosure Act 2013* (Cth) Such an arrangement would avoid clashes between two integrity officials (and their supporting staff) with *equal* claims to authority and jurisdiction over certain whistleblower

43 I would be flabbergasted if any participating member of the Legal and Constitutional Affairs Committee formed the view that Ms Hodzic's decision notice contains, in the light of the functions and powers set out in the *Ombudsman Act 1976* (Cth), justifiable reasons unaffected by glaring fallacies.

complaints, while ensuring that plainly unjustifiable decisions (whether the basis is fallacy, illogicality, unreasonableness, unlawfulness etc.) are not left unremedied under the law [44]

[65] Of course, this is to say nothing of the even broader sweep of the definition of a *whistleblower protection issue*, which extends to *allegations*, *reasonable suspicions*, or *information* relating to a relevant act or omission, or failure. The *information* set out in these submissions about the way Cassandra Hodzic conducted her investigation, under the *Ombudsman Act 1976* (Cth), into Professor Tregear's complaints about being denied procedural fairness *is* a *whistleblower protection issue* for the purposes of the Bill.

II-D3. *De facto* review of decisions of the Office of the Commonwealth Ombudsman

II-D3.1. The breadth of *whistleblower protection issue*

[66] As earlier noted, the definition of a *whistleblower protection issue* in the Bill is broad

[67] Relevantly, the definition of a *whistleblower protection issue* extends to *an act or omission that causes detriment to any person as a result of that person, or any other person, making a disclosure of wrongdoing under a Commonwealth law*, such as the *Public Interest Disclosure Act 2013* (Cth).

II-D3.2. Interpretation of *whistleblower protection issue* and the consequences of interpretation

[68] While seemingly clear, the definition set out above is not as clear as it appears; it will require interpretation in the light of relevant facts.

[69] Consider the definition in the light of the investigation of Professor Peter Tregear's public interest disclosure while he was at the Australian National University.

[70] If the Whistleblower Protection Commissioner were to adopt a *narrow* interpretation of the definition of a whistleblower protection issue, the Commissioner would likely conclude that the act or omission that, as a result of Professor Tregear making a disclosure of wrongdoing under the *Public Interest Disclosure Act 2013* (Cth), caused detriment to Professor Tregear was, *and only was*, the apparent denial of procedural fairness on the part of the Australian National University's investigator.[45]

[71] But if the Whistleblower Protection Commissioner were to adopt a *broad* interpretation of the definition of a whistleblower protection issue, then the Commissioner might also form the opinion that Ms Hodzic's decision to terminate her investigation under the *Ombudsman Act 1976* (Cth) constituted a whistleblower protection issue.

[72] Such a view depends on the meaning of *result* in the definiton of a *whistleblower protection issue*

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44 The proposed inspector would, in a scenario like the one discussed in this part of these submissions, refer the matter back to the Ombudsman noting the errors in the reasons, and direct that the investigation, under the *Ombudsman Act 1976* (Cth), of the complaint about the inadequate public interest disclosure investigation is properly conducted, with due regard for the use of compulsory powers, provided by the Parliament, where the merits of the case require their use

45 I doubt any lawyer worth his or her salt would be game enough to claim that where a whistleblower has been denied procedural fairness, and that denial of procedural fairness is the effective cause of *possible* practical injustice (e.g. see, generally, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, and, specifically, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 339), the denial of procedural fairness is not an act or omission that causes a detriment

[73] In the context of Ms Hodzic's decision to terminate her investigation under the *Ombudsman Act 1976* (Cth), the issue under consideration is whether Ms Hodzic's decision to terminate her investigation was *a result* of Professor Tregear making a disclosure under a Commonwealth law.[46]

[74] It is to be noted that the word *immediate* does not qualify the word *result* in the definition of a *whistleblower protection issue*. In other words, the definition of a *whistleblower protection issue* is **not** *an act or omission that causes detriment to any person as* ***an immediate*** *result of that person, or any other person, making a disclosure of wrongdoing under a Commonwealth law*, such as the *Public Interest Disclosure Act 2013* (Cth).

[75] But for Professor Tregear making a disclosure of wrongdoing, pursuant to the *Public Interest Disclosure Act 2013* (Cth), to relevant officials in the Australian National University, Ms Hodzic would not have been in a position to terminate her investigation, under the *Ombudsman Act 1976* (Cth), into Professor Tregear's complaint about ANU's investigator denying Professor Tregear procedural fairness during the public interest disclosure investigation. In other words, Professor Tregear's disclosure of wrongdoing to relevant officials in the Australian National University was a *necessary condition* to Ms Hodzic terminating her investigation, under the *Ombudsman Act 1976* (Cth), into the inadequacy of the ANU's public interest disclosure investigation.

[76] Giving the word *detriment* its natural meaning in the definition of a *whistleblower protection issue*, Ms Hodzic's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) caused detriment to Professor Tregear, in as much as Professor Tregear's legal interest in the public interest disclosure he submitted being "properly investigated and dealt with" was undermined by Ms Hodzic's handling of her investigation.[47]

[77] While not the ***immediate*** *result* of a disclosure of wrongdoing, Ms Hodzic's act, which was to terminate an investigation under the *Ombudsman Act 1976* (Cth) for reasons that are patently illogical and unreasonable, caused detriment to Professor Tregear as *a result* of Professor Tregear making a disclosure of wrongdoing under a law of the Commonwealth, in as much as the disclosure of wrongdoing was a *necessary condition* to the exercise of Ms Hodzic's power to terminate her investigation under the *Ombudsman Act 1976* (Cth).

[78] It follows that, if the Whistleblower Protection Commissioner were to adopt a *broad* interpretation of the definition of a whistleblower protection issue, decisions, made by officials in the Office of the Commonwealth Ombudsman under the *Ombudsman Act 1976* (Cth), that cause detriment (e.g. undermine a whistleblower's legal interest in a public interest disclosure being "properly investigated and dealt with") to a whistleblower could constitute *whistleblower protection issues*.

[79] Since, under the Bill, the Whistleblower Protection Commissioner may either investigate a whistleblower protection issue,[48] or refer a whistleblower protection issue to a Commonwealth agency,[49] the Whistleblower Protection Commissioner could, in effect, conduct *de facto* reviews of complaints, made by whistleblowers to the Commonwealth Ombudsman, about inadequate public interest disclosure investigations where the handling of those complaints, by officials in the Office of the Commonwealth Ombudsman, cause detriment.[50]

46 In light of the fact that Professor Tregear made a disclosure under the *Public Interest Disclosure Act 2013* (Cth) to an appropriate officer at the Australian National University, there is not doubt that a disclosure was made under a Commonwealth law for the purposes of the Bill.

47 Paragraph 6(d) of the *Public Interest Disclosure Act 2013* (Cth) explicitly sets out one of the cardinal purposes of the enactment, which is "to ensure that disclosures by public officials, and former public officials, are *properly* investigated and dealt with."

48 Bill, s 22(1)(a).

49 Bill, s 22(1)(b)

50 Since, under Part 4, Division 3 of the Bill, a staff member of the Whistleblower Protection Authority is not liable to civil proceedings in relation to acts or omissions done in good faith, unless a court of competent jurisdiction were to find that the Whistleblower Protection Commissioner's interpretation of the meaning of a *whistleblower protection issue* did not constitute an intrajurisdictional error of law, but constituted a jurisdictional error, the broad

[80] Has this consequence of the breadth of the concept of a *whistleblower protection issue* been considered by the drafters of the Bill? Is it an intended consequence? More to the point, is the intended meaning of a *whistleblower protection issue* captured by the narrow or the broad interpretation set out above, or is the intended meaning something otherwise? Whatever the intended meaning, the drafters of the Bill should express that meaning as clearly and an unambiguously as possible in an attempt to better avoid unintended consequences, such as de facto review, if that was not an intended consequence.

[81] Of course, if review of the decisions of the Commonwealth Ombudsman and his delegates is an intended consequence, then I would encourage the drafters of the legislation to redraft the definition of a *whistleblower protection issue* so that it explicitly conforms to the narrow interpretation set out above, and then include *explicit* provisions, in the Bill, granting an inspector (whether or not that is the Whistleblower Protection Commissioner is a matter for the Committee and Parliament) review powers in respect of decisions arising from complaints, made to the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security, about the handling of whistleblower disclosures on the following grounds:

> a) a failure to meet best practice in respect of making administrative decisions under relevant enactments; and/or
>
> b) a failure to exercise, without adequate justification, powers to compel the production of evidence or materials, particularly where the context of the complaint suggests that the exercise of such powers would be warranted; and/or
>
> c) acts or omissions of relevant officials being unreasonable, unjust, or oppressive in their effects, irrespective of whether the acts or omissions are lawful or unlawful; and/or
>
> d) unlawful conduct.

[82] Again, this is to say nothing of the even broader sweep of the definition of a *whistleblower protection issue*, which extends to *allegations*, *reasonable suspicions*, or *information relating* to a relevant act or omission, or failure that causes detriment to any person as a result of that person, or any other person, making a disclosure of wrongdoing under a Commonwealth law.[51]

II-D4. Some concluding statements about the implications of the conceptual breadth of a *whistleblower protection issue*

[83] On introducing the Bill into the Senate, Senator David Pocock noted that the Parliament had fallen short of providing whistleblowers with necessary protections, such that those "risking their jobs,

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interpretation would be *the* interpretation of that definition. In my opinion, the likelihood of a finding of jurisdictional error is, in the light of the authorities, slim.

51 Allegations, reasonable suspicions or information *relate* to acts or omissions, or failures that cause detriment to any person as a result of that person, or any other person, making a disclosure of wrongdoing under a Commonwealth law if they touch on, or are relevant to, acts, omissions or failures that causes detriment. It does not take much to *relate* to something: it all depends on the interpretation to be given to the relationship of the relevant allegation, or suspicion or information to the act or omission, or failure that causes detriment. Reasonable minds will differ and such difference will, invariably, be the source of disagreement and, sometimes, acrimony. Acrimony, especially in respect of a whistleblower protection authority, is best avoided as it undermines confidence in that authority. Careful consideration about the limits of the authority's discretion, clarity of its functions, Parliamentary and judicial oversight, and transparency may be the difference between an authority that is respected and one that is written off as just another inscrutable waste of taxpayer resources (see, for example, the article by the noted Canberra barrister Mr Hugh Selby, *Revealed 'Irregular' goings on at the Federal Court*, Canberra City News, 10 June 2025, <https://citynews.com.au/2025/revealed-irregular-goings-on-at-the-federal-court/>, and, in particular, Mr Selby's assessment of the relevant Commonwealth integrity agencies' considerations of the issues as having "the look of 'independent review', but the reality of a waste of time, money and expectations").

reputations, and safety to shine a light on wrongdoing" have "[f]or decades . . had to fend for themselves."[52]

[84] The evidence marshalled in support of the submissions in part II of these submissions demonstrates that investigations of whistleblower disclosures handled under the *Public Interest Disclosure Act 2013* (Cth) are not being done according to law.

[85] The evidence demonstrates that the oversight authority tasked by the Parliament with receiving and investigating complaints about the handling of public interest disclosures, the Office of the Commonwealth Ombudsman, is failing to deal with those complaints competently and, thus, failing whistleblowers.

[86] The evidence also demonstrates that the Commonwealth Ombudsman's officials are as feckless as they are incompetent. Plainly, they respond to contempt with weakness. Plainly, their decisions are riddled with fallacies and errors.

[87] Plainly, amongst other things, the evidence supports the apparent need for a mechanism to protect whistleblowers from the consequences of unlawful investigations, and the incompetence and weakness of officials in the agency responsible for "administering the Public Interest Disclosure (PID) Scheme which promotes the integrity of the Commonwealth public sector ..."[53]

[88] The Bill, which has been presented to the Senate by Senators David Pocock and Lambie as the solution to the unsatisfactory state that whistleblowers find themselves in, is, upon reflection, not without its problems.

[89] As it stands, there is nothing in the Bill to suggest that the Commonwealth Ombudsman will be deprived of his jurisdiction in respect of public interest disclosures under the *Public Interest Disclosure Act 2013* (Cth). That has problematic consequences.

[90] A key concept in the Bill, about which so much turns, is that of the *whistleblower protection issue*. The breadth of the definition has problematic consequences.

[91] One problematic consequence of the Bill is that, with both the Commonwealth Ombudsman and the proposed Whistleblower Protection Commissioner having jurisdiction in respect of complaints about the handling of public interest disclosure investigations under the *Public Interest Disclosure Act 2013* (Cth), aggrieved whistleblowers will be able to "shop around" for the best forum to lodge complaints, with its attendant consequences.

[92] A second consequence of the Bill is that, as it is drafted currently, there is the prospect of the Commonwealth Ombudsman and the proposed Whistleblower Protection Commissioner clashing in their assessments of issues arising from the same factual and/or legal matrices, and how best to handle those issues.

[93] Third, as the Bill is currently drafted, if the proposed Whistleblower Protection Commissioner were to adopt a broad interpretation of a *whistleblower protection issue*, that interpretation would mean that the Whistleblower Protection Commissioner could *de facto* review complaints handled by the Commonwealth Ombudsman, or his delegates, about inadequate public interest disclosure investigations without that power explicitly being set out in the proposed legislation. In light of the proposed limitations on judicial review set out in Part 4, Division 3 of the Bill, challenging the legality of such an interpretation of the a *whistleblower protection issue* would, in my opinion, be so unlikely as to be practically impossible.

52 Second Reading Speech, Whistleblower Protection Authority Bill 2025 (No 2), 11 February 2025, *Hansard*, page 473.

53 Office of the Commonwealth Ombudsman, *2024-2025 Corporate Plan*, 30 August 2024, page 10 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0024/304935/Corporate-Plan-2024-25.pdf>

[94] It is not clear if these consequences, which primarily stem from the breadth of the definition of a whistleblower protection issue, but also stem from the observation that the Commonwealth Ombudsman appears to retain his jurisdiction and functions in respect of whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth), are the outcome of careful consideration or are unintended

[95] I submit that the Legal and Constitutional Affairs Committee should carefully consider the consequences of the definition of a whistleblower protection issue, particularly in light of the seeming continuation of the Commonwealth Ombudsman's role in respect of whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth).

PART III – THE PROPOSED IMMUNITIES OF STAFF MEMBERS AND PERSONS ASSISTING THE WPA

III-A. The immunities proposed

[96] Part 4, Division 3 of the Bill sets out the immunities that *staff members* have from civil proceedings.

[97] According to the Bill, a staff member of the WPA is not liable to civil proceedings in relation to an act done, or omitted to be done, in good faith, in the performance or purported performance, or exercise or purported exercise, of the staff members' functions, powers or duties under, or in relation to, the proposed enactment.[54]

[98] Moreover, persons requested to assist a staff member of the WPA by the Commissioner, are not liable to civil proceedings in relation to an act done, or omitted to be done, in good faith for the purpose of assisting the relevant staff member.[55]

[99] A *staff member* of the WPA is defined as:

> a) the Commissioner; or
>
> b) any Deputy Commissioners; or
>
> c) the Chief Executive Officer; or
>
> d) a member of staff employed under the *Public Service Act 1999* (Cth); or
>
> e) a consultant engaged under section 61 of the Bill; or
>
> f) a person referred to in section 62 of the Bill.

III-B. The functions of the Whistleblower Protection Commissioner

[100] Amongst other things, the functions of the Whistleblower Protection Commissioner include:

> a) to manage, oversee or review, in appropriate circumstances, the manner in which Commonwealth agencies investigate or deal with disclosures of wrongdoing, in respect of whistleblower protection issues;[56] and

54 Bill, s 64(1).
55 Bill, s 64(2).
56 Ibid, s 10(1)(f)

b) to do anything incidental or conducive to the performance of the function of managing, overseeing or reviewing, in appropriate circumstances, the manner in which Commonwealth agencies investigate or deal with disclosures of wrongdoing, in respect of whistleblower protection issues.[57]

III-C. Limiting judicial review to acts done, or omissions made, that are not in good faith

III-C1. Judicial review for acts done, or omissions made, that are not in good faith

[101] It is no purpose of these submissions to educate the Committee on the mechanisms, history or development of the law of judicial review, both at common law and under statute, in Australia.

[102] I take for granted that the Committee is aware that

a) since the passage of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), a statutory scheme for judicial review has existed in respect of the decisions of the Commonwealth's administrative decision makers;[58] and

b) applications for judicial review of acts not done, or omissions not made, in good faith by officials of the Commonwealth may be submitted to courts of competent jurisdiction under the ADJR Act.[59]

[103] Strictly speaking, the ADJR Act provides that an improper exercise of power extends to an exercise of a discretionary power in *bad faith*.[60] It does not follow that an act not done, or an omission not made, in good faith is *necessarily* an exercise of power in *bad faith*.

[104] That said, in respect of an analogous immunity provision in the *Ombudsman Act 1976* (Cth),[61] the Full Court of the Federal Court of Australia took for granted that liability for "an act done or omitted to be done in good faith" is to be understood as liability for an act done, or omitted to be done, in *bad faith*.[62]

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57 Ibid, s 10(1)(q)

58 Aside from the outstanding academic works on judicial review in Australia, which are too many to even consider mentioning, I commend the following reports to the Committee:

a) *Commonwealth Administrative Review Committee Report 1971*, Parliamentary Paper No 144 of 1971, and

b) *Prerogative writ Procedures Report of Committee of Review*, Parliamentary Paper No 56 of 1973

The interim and final reports of the *Bland Committee* are also recommended

59 e.g. *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(1)(e) and 5(2)(d).

60 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2)(d).

61 *Ombudsman Act 1976* (Cth), s 33. The provision provides that "neither the Ombudsman nor a person acting under under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done *in good faith* in exercise or purported exercise of any power or authority conferred by this Act ..."

62 *Paschke v Secretary, Department of Social Services* [2023] FCAFC 143, [22] I accept that it is inappropriate to assume that because liability for "an act done or omitted to be done in good faith" is to be understood as liability for an act done, or omitted to be done, in *bad faith* in the context of the *Ombudsman Act 1976* (Cth), it follows that references to liability for "an act done, or omitted to be done, in good faith" in the Bill must also be understood to necessarily extend to bad faith. That is because the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the relevant statute (*Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, [69]), and the purposes of the *Ombudsman Act 1976* (Cth) are distinct to the purposes of the Bill. That said, it is not altogether illegitimate to consider how similarly worded provisions apply in other legislation so long as one keeps primary canons of statutory interpretation at the fore of one's mind, and does not jump to conclusions. For an clear and concise statement on the senses in which the expressions "good faith" and "bad faith" are deployed in the law, please refer to the *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32, [11] – [13].

[105] In the light of the canons of statutory interpretation, I think that the sense in which liability is to be ascribed for "an act done, or omitted to be done, in good faith" in the Bill is synonymous with bad faith for the purposes of the ADJR Act

III-C2. Acts done, or omissions made, in bad faith

[106] Under Australian law, allegations of bad faith are not to be lightly made.[63]

[107] Allegations of bad faith must be clearly alleged and proved.[64]

[108] Bad faith cannot be constituted by recklessness in the sense of negligence, no matter how gross the negligence. A tribunal member cannot blunder into bad faith, no matter how stupid and careless the tribunal member is, any more than a person can blunder into deceit or wilful blindness.[65]

[109] Illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith.[66]

[110] Bad faith is not just a matter of poor execution or poor decision-making involving error. It is a lack of an honest or genuine attempt to undertake the task in a way meriting personal criticism of the tribunal or officer in question.[67]

[111] Bad faith is a serious matter involving *personal fault* on the part of the decision-maker going beyond the errors of fact or law which are inevitable in any such process.[68] There is no such thing as deemed or constructive bad faith.[69]

[112] Cases in which bad faith is established will be rare and extreme.[70]

III-C3. Why limiting access to the judiciary is regrettable for whistleblowers

III-C3.1. Introduction

[113] Under the Bill, whistleblowers affected by decisions of staff members of the WPA will only be able to bring an action against the relevant official for act done, or omitted to be done, in bad faith.[71]

[114] As it happens, whistleblowers, who have a right to complain to the Commonwealth Ombudsman about inadequacies pertaining to whistleblower investigations under the *Public Interest Disclosure Act 2013* (Cth), are also limited, in their rights to bring actions against officials in the Office of the Commonwealth Ombudsman, to the ground of bad faith under the *Ombudsman Act 1976* (Cth).[72]

[115] Limiting a whistleblower's access to the judiciary on the limited ground of bad faith is regrettable because cases in which bad faith will be established are rare and extreme.

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63 *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361, [43]

64 Ibid. Also refer to *SZQBN v Minister for Immigration and Citizenship* (2013) 213 FCR 297, [63], where the Full Court of the Federal Court that allegations of bad faith must be pleaded specifically and with particularity

65 *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 210, [24].

66 *Minister for Immigration and Multicultural and Indigenous Affairs v SB4N* [2002] FCAFC 431, [8]

67 *NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 713, [24]

68 *SBAP v Refugee Review Tribunal* [2002] FCA 590, [49]

69 *Minister for Immigration and Multicultural and Indigenous Affairs v SB4N* [2002] FCAFC 431, [8]

70 *Haritopoulos Pty Ltd v Deputy Commissioner of Taxation* [2007] FCA 394, [32]

71 B.II, s 64. Of course, where the decision of a staff member of the WPA is affected by jurisdictional error, a whistleblower may avail himself or herself of the entrenched right, set out in section 75(v) of the Constitution, to apply to the High Court of Australia for the issuance of the Constitutional writs. The Federal Court of Australia

72 *Ombudsman Act 1976* (Cth), s 33

[116] More often than not, decisions detrimentally affecting a whistleblower will be based on errors of law.

[117] In the context of the Bill, there is nothing in the Bill, or the explanatory memorandum to the Bill, or in the second reading speech that shed any light on why whistleblowers should be denied access to the judiciary to remedy errors of law in respect of unlawful administrative decisions.

[118] Why whistleblowers should be denied access to the judiciary for errors of law made by the WPA or, for that matter, the Commonwealth Ombudsman, is not clear.

[119] The relative injustice wrought is best illuminated by way of a study of the Commonwealth Ombudsman's handling of a complaint into a mishandled public interest disclosure investigation, conducted by Ms Kate McMullan of the Australian Public Service Commission, into allegations of unlawful recruitment or promotion decisions made in respect of registrars of the Federal Court of Australia.

III-C3.2. The essentials of Mr Mark Anstey's reasons for terminating an investigation, under the *Ombudsman Act 1976* (Cth), into a mishandled whistleblower disclosure investigation conducted under the *Public Interest Disclosure Act 2013* (Cth)

[120] It is public information that, in 2020, Ms Kate McMullan of the Australian Public Service Commission conducted an investigation of a whistleblower disclosure, under the *Public Interest Disclosure Act 2013* (Cth), into allegations of the systemic unlawful recruitment of registrars of the Federal Court of Australia.

[121] It is also public information that the acting Commonwealth Ombudsman, Ms Penelope McKay, the acting Commonwealth Ombudsman, commenced an investigation, under the *Ombudsman Act 1976* (Cth), into Ms Kate McMullan's public interest disclosure investigation on account of the inadequacy Ms McMullan's investigation.

[122] Aside from several articles published in national newspapers on the allegation of the systemic unlawful recruitment of registrars of the Federal Court of Australia,[73] hundreds of documents have been released under the *Freedom of Information Act 1982* (Cth) by officials in several Commonwealth agencies, including the Federal Court of Australia, the Australian Public Service Commission and the Office of the Commonwealth Ombudsman.

[123] By way of some pertinent examples, the following documents have been released under the *Freedom of Information Act 1982* (Cth) by authorised officers in federal agencies:

> a) a notice, dated 1 May 2020, from an official in the Office of the Commonwealth Ombudsman noting her intention to allocate a whistleblower disclosure, made under the *Public Interest Disclosure Act 2013* (Cth), to the Australian Public Service Commission for investigation [74]

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73 By way of example, no fewer than five articles were published on the subject in *The Australian* in 2022 and 2023. Those articles have even been published on the freedom of information disclosure logs of the Federal Court of Australia and the Attorney-General's Department. See:

a) disclosure PA2925-06-56 on the Federal Court of Australia's freedom of information disclosure log - https://www.fedcourt.gov.au/__data/assets/pdf_file/0008/99368/PA2925-0656-2_Email-to-Mr-Palmer-dated-29-March-2022.pdf .

b) disclosure FOI23-547 on the Attorney-General's Department's freedom of information disclosure log - https://www.ag.gov.au/node/6506 .

74 The document in question was the subject of an access decision, under the *Freedom of Information Act 1982* (Cth), on 14 January 2022. The decision maker was Mr Gregory Parkhurst, senior legal officer in the legal team in the Office of the Commonwealth Ombudsman. The Ombudsman's reference number for the freedom of information decision is FOI-2021-10121

https://archive.org/details/pid-2020-400006-notice-of-intention-to-allocate-public-interest-disclosure-to-apsc ; and

b) a notice, dated 11 May 2020, from an official in the Office of the Commonwealth Ombudsman allocating a whistleblower disclosure, made under the *Public Interest Disclosure Act 2013* (Cth), to the Australian Public Service Commission for investigation references LEX 1151; LEX 1204 on the APSC's freedom of information disclosure log https://www.apsc.gov.au/sites/default/files/2024-11/LEX%201151%20%26%201204%20-%20Document%201.pdf ; and

c) a report prepared in December 2020 by Kate McMullan, pursuant to section 51 of the *Public Interest Disclosure Act 2013* (Cth), setting out her findings and conclusions in respect of the her investigation into allegations of the unlawful recruitment of registrars of the Federal Court of Australia:[75] https://archive.org/details/pid-2020-400006-december-2020-kate-mc-mullan-report-issued-under-s-51-of-the-pid , and

d) a notice, dated 18 March 2022, from the acting Commonwealth Ombudsman, Ms Penny McKay, to the Australian Public Service Commissioner, Mr Peter Woolcott, noting that she had commenced an investigation, under the *Ombudsman Act 1976* (Cth), into Kate McMullan's handling of a whistleblower investigation into the allegations of the unlawful recruitment of registrars of the Federal Court of Australia: reference LEX 1096 on the APSC's freedom of information disclosure log – https://www.apsc.gov.au/sites/default/files/2024-08/LEX%201096%20-%20Document.pdf ; and

e) a notice, dated 12 December 2022, from Mr Mark Anstey, acting assistant director in the public interest disclosure team in the Office of the Commonwealth Ombudsman, noting his decision to terminate the investigation commenced by the acting Commonwealth Ombudsman on 18 March 2022.[76] https://archive.org/details/pid-2020-400006-2022-12-12-2021-104592-mark-anstey-foi-2023-10045-decision-to-ab ; and

f) a notice, dated 15 December 2022, from Ms Carmen Miragaya, director of the public interest disclosure team in the Office of the Commonwealth Ombudsman, to the Australian Public Service Commission, setting out comments and suggestions, under subsection 12(4) of the *Ombudsman Act 1976* (Cth), about the aborted investigation [77] https://archive.org/details/pid-2020-400006-2022-12-15-2021-104592-foi-2025-80009-carmen-miragaya-report-iss , and

g) a request, dated 10 March 2023, for internal review of Mr Mark Anstey's decision to terminate the investigation commenced by the acting Commonwealth Ombudsman on 18 March 2022:[78] https://archive.org/details/pid-2020-400006-2023-03-10-2021-104592-office-of-the-commonwealth-ombudsman-requ ; and

75 The document in question was the subject of an access decision, under the *Freedom of Information Act 1982* (Cth), on 14 January 2022. The decision maker was Mr Gregory Parkhurst, senior legal officer in the legal team in the Office of the Commonwealth Ombudsman. The Ombudsman's reference number for the freedom of information decision is FOI 2021-10121.

76 The document in question was the subject of an access decision, under the *Freedom of Information Act 1982* (Cth), on 31 August 2023. The decision maker was Ms Jodie Ann Hanlon, director of the legal team in the Office of the Commonwealth Ombudsman. The Ombudsman's reference number for the freedom of information decision is FOI-2023-10045. Mark Anstey's reasons for decision are annexed to these submissions, on pages 78 – 82.

77 The document has been published on the Commonwealth Ombudsman's freedom of information disclosure log, with a disclosure reference of FOI-2025-80009 and an access date of 19 March 2025 – https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/317470/FOI-2025-80009.pdf

78 The document in question was the subject of an access decision, under the *Freedom of Information Act 1982* (Cth), on 20 November 2023. The decision maker was Ms Jodie Ann Hanlon, director of the legal team in the Office of the Commonwealth Ombudsman. The Ombudsman's reference number for the freedom of information decision is FOI-2023-10101.

h) a summary of the grounds of review set out in the internal review request, on account of Mr Mark Anstey's refusal to action the internal review request without a three page summary "explaining why .. [Mr Anstey's] decision was wrong":[79] https: archive.org details pid-2020-400006-2023 03-23-2021-104592-response-to-mark-anstey-three-page-summar

[124] In the application for internal review, the whistleblower noted that, while Mr Anstey's reasoning was "meandering and, at times, difficult to make sense of", Mr Anstey had terminated the investigation commenced by acting Commonwealth Ombudsman Penny McKay on three broad grounds.[80]

[125] For the purpose of this part of these submissions, which is to draw attention to the undesirability of Part 4, Division 3 of the Bill, it is enough to address the first ground set out in Mr Anstey's reasons for decision [81]

[126] The first ground proffered by Mr Anstey as justification for terminating the investigation commenced by the acting Commonwealth Ombudsman was that, in Mr Anstey's opinion, the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID .. because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened."[82] According to a senior legal officer in the Office of the Commonwealth Ombudsman, the basis for Mr Anstey's proposition that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID .. because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" was both the *Public Interest Disclosure Act 2013* (Cth) and the *Ombudsman Act 1976* (Cth).[83]

[127] The whistleblower succinctly addressed the error in Mark Anstey's proposition in four point.[84] Those points are set out below.

[128] ***First***, the whistleblower noted that there is nothing in the nature of an administrative decision, such as a decision made under the *Public Interest Disclosure Act 2013* (Cth), which requires a conclusion that a power to make a decision, when purportedly exercised, is necessarily spent *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [5]

[129] As Gleeson CJ noted, the real issue is "whether the statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen": *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [8].

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79 The document in question was the subject of an access decision, under the *Freedom of Information Act 1982* (Cth), on 20 November 2023 The decision maker was Ms Jodie Ann Hanlon, director of the legal team in the Office of the Commonwealth Ombudsman. The Ombudsman's reference number for the freedom of information decision is FOI 2023-10101

80 See page 71 of these submissions.

81 Those interested in the other grounds of review are at liberty to read the application for internal review, which was released under the *Freedom of Information Act 1982* (Cth) by Ms Jodie Ann Hanlon, director of the legal team in the Office of the Commonwealth Ombudsman https: archive.org details pid 2020-400006-2023 03-10-2021-104592-office-of-the-commonwealth-ombudsman-requ

82 See page 71 of these submissions.

83 In response to a request for access to the documents upon which Mark Anstey based his conclusion that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened", Mr Steven Mulipola, senior legal officer in the Office of the Commonwealth Ombudsman, identified two documents the *Public Interest Disclosure Act 2013* (Cth) and the *Ombudsman Act 1976* (Cth). In the record of decision, Mr Mulipola stated

> After consultation with the relevant Ombudsman officer named in the request, I am satisfied that the only documents that reasonably fall within the scope of your request are the PID Act and the Ombudsman Act

Mr Mulipola's decision can be accessed here https: archive org details pid 2020-400006-for 2023 10005-2023 03-24-steven-mulipola-office-of-the-commonwe

84 See pages 73 – 76 of these submissions.

[130] ***Second***, the meaning of the word *investigate* "in relation to a disclosure, means investigate (or reinvestigate) whether there are one or more instances of disclosable conduct": *Public Interest Disclosure Act 2013* (Cth), s 47(2).

[131] Parliament has explicitly provided powers (to adopt Mr Anstey's choice of terminology) to "reopen" a finalised public interest disclosure investigation because Parliament has, in the relevant Part and Division of the *Public Interest Disclosure Act 2013* (Cth), explicitly defined the word *investigate* as meaning "reinvestigate … one or more instances of disclosable conduct".

[132] ***Third***, there is nothing in the *Public Interest Disclosure Act 2013* (Cth) that prohibits the reinvestigation of a public interest disclosure because the original investigation was inadequate in law. On the contrary, the *Public Interest Disclosure Act 2013* (Cth) makes quite clear that one of its fundamental objects is to ensure that disclosures made by public officials are to be properly investigated and dealt with: *Public Interest Disclosure Act 2013* (Cth), s 6(d).

[133] It would be contrary to this object to infer that the re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is prohibited, particularly when the original investigation conducted by Kate McMullan is affected by legal errors, including errors that go to jurisdiction.

[134] Indeed, the inference to be drawn, in the light of the canons of statutory interpretation, is that re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is not only permitted, but encouraged because a fundamental object of the *Public Interest Disclosure Act 2013* (Cth) is to ensure that disclosures made by public officials are to be properly investigated and dealt with. To permit a disclosure to remain improperly investigated and improperly dealt with would be to actively defeat a fundamental object of the *Public Interest Disclosure Act 2013* (Cth).

[135] ***Fourth***, the claim that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure]" is demonstrably false because it is well within the Ombudsman's power to, along with any report issued under section 15 of the *Ombudsman Act 1976* (Cth) to the Australian Public Service Commission, include "any recommendations he or she thinks fit", which would extend to a recommendation to the Australian Public Service Commissioner to ensure that the public interest disclosure is properly investigated and dealt with.

[136] The whistleblower teased out the implication in Mr Anstey's erroneous statement of the law, asking:[85]

> Is the Australian community to understand that in the last decade, right or wrong, deficient, inadequate or otherwise, once a public interest disclosure investigation was finalised, there was simply no "mechanism for a finalised PID investigation to be reopened", such that a deficient or inadequate investigation was final and binding?
>
> What is the point of having a right to complain to the Office of the Commonwealth Ombudsman about the inadequacy of a public interest disclosure investigation if the legal position is, as Mark Anstey erroneously claims it to be, that a public interest disclosure cannot be reinvestigated "because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened"?

III-C3.3. An assessment of the justification for limiting the access of a whistleblower to the judiciary to decision made in bad faith

85 See page 76 of these submissions.

[137] Plainly, in the light of High Court authority and the very terms of the *Public Interest Disclosure Act 2013* (Cth), Mr Anstey's conclusion that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID .. because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" is unjustifiable

[138] In the ordinary course, so glaring an error of law would be capable of remedy because a person aggrieved by Mr Anstey's decision would be entitled to apply to the Federal Court of Australia or Division 2 of the Federal Circuit and Family Court of Australia for judicial review on account of an error of law.[86]

[139] Unfortunately, whistleblowers are denied this general statutory right to apply for judicial review in respect of legally erroneous decisions made by officials in the Office of the Commonwealth Ombudsman because neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of any power or authority conferred by the *Ombudsman Act 1976* (Cth).[87]

[140] That is because, as the lamented Gyles J so deftly put it, a decision-maker cannot blunder into bad faith, no matter how stupid and careless the person is, any more than a person can blunder into deceit or wilful blindness.[88] Bad faith is not just a matter of poor execution or poor decision-making involving error. It is a lack of an honest or genuine attempt to undertake the task in a way meriting personal criticism of the tribunal or officer in question.[89]

[141] In other words, no matter how stupid the error of law, it will not constitute bad faith without a demonstration that the relevant official's actions or omissions lacked an honest or genuine attempt to undertake the task in a way meriting personal criticism. This is all but impossible.[90] [91]

[142] But why should a whistleblower's right to remedy an error made by a person dealing with a whistleblower protection issue be premissed on the *intentions* of a decision-maker? It makes no difference to the *consequences* of an error whether or not a decision-maker has made an error of law in good faith or in bad faith; the error is real and affects the whistleblower. The focus shifts from *lawfully dealing with the wrongdoing* underlying the disclosure, which is the primary purpose of whistleblower legislation, to the state of mind of the person dealing with the disclosure of wrongdoing. The state of mind of a person dealing with a disclosure is of no practical relevance to dealing effectively with wrongdoing in the Commonwealth.

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86 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1)(f).

87 *Ombudsman Act 1976* (Cth), s 33(1).

88 *NAKF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 210, [24]

89 *NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 713, [24]

90 *Haritopoulos Pty Ltd v Deputy Commissioner of Taxation* [2007] FCA 394, [32]

91 In *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, Justice Murphy characterised the Robodebt debacle as "a shameful chapter in the administration of the Commonwealth social security system and a massive failure of public administration" *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, [5]. Despite this characterisation, Justice Murphy was not prepared to find that the decisions of those senior public servants responsible were made in bad faith. Justice Murphy summed it up effectively when he stated, at paragraph [6]

> It is, however, one thing for the applicants to be in a position to prove that the responsible Ministers and senior public servants should have known that income averaging based on ATO data was an unreliable basis upon which to raise and recover debts from social security recipients. It is quite another thing to be able to prove to the requisite standard that they actually knew that the operation of the Robodebt system was unlawful. There is little in the materials to indicate that the evidence rises to that level. I am reminded of the aphorism that, given a choice between a stuff-up (even a massive one) and a conspiracy, one should usually choose a stuff up

Even with all that was exposed in the evidence in *Prygodicz*, bad faith was not countenanced.

[143] It is also worth noting that the inability to effectively institute proceedings, in the Federal Court of Australia or Division 2 of the Federal Circuit and Family Court of Australia, for judicial review against officials in the Office of the Commonwealth Ombudsman on account of an error of law in respect of decisions relating to public interest disclosures is, aside from being regrettable, incongruous

[144] Under the *Public Interest Disclosure Act 2013* (Cth), while a decision-maker is not liable to criminal or civil proceedings for or in relation to an act or matter done, or omitted to be done, in good faith,[92] a whistleblower's right to apply to a court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in relation to a decision made under the *Public Interest Disclosure Act 2013* (Cth) is unaffected.[93]

[145] In other words, a person aggrieved by the decision of a decision-maker acting, or purportedly acting, under the *Public Interest Disclosure Act 2013* (Cth) is still entitled to apply for judicial review under the ADJR Act.

[146] Why should a whistleblower not be able to bring an action for judicial review in respect of errors of law made by the Commonwealth Ombudsman's officials when investigating inadequate public interest disclosures when whistleblowers have a right to apply for judicial review in respect of the substantively erroneous decision made by the investigator acting, or purporting to act, under the *Public Interest Disclosure Act 2013* (Cth)?

[147] More to the point, why should a whistleblower not be able to bring an action for judicial review in respect of errors of law made by the WPA's officials when investigating inadequate public interest disclosures when whistleblowers have a right to apply for judicial review in respect of the substantively erroneous decision made by the investigator acting, or purporting to act, under the *Public Interest Disclosure Act 2013* (Cth)?

[148] Obviously, the justification cannot be that the substance of a public interest disclosure should be kept from the judiciary; whistleblowers are able to seek judicial review of the substantive decision made, or purportedly made, under the *Public Interest Disclosure Act 2013* (Cth).

[149] I searched for an explanation in the explanatory memorandum to the Bill for a justification for the immunities proposed in Part 4, Division 3 of the Bill. The following is recorded in the explanatory memorandum to the Bill:

> **Clause 64: Immunity from civil proceedings for staff members of the Authority and persons assisting**
>
> 109 This clause exempts a staff member of the Authority from liability in civil proceedings in relation to an act done, or omitted to be done, in good faith and in accordance with the Act. This immunity extends to persons assisting a staff member at the request of the Commissioner.

[150] One does not need a philosophically sophisticated command of the concept of explanation to notice that what is included in the explanatory memorandum is not an explanation.[94] It is a tepid restatement of the provision.

[151] To characterise this inclusion in the explanatory memorandum to the Bill as useless would be too kind; it is worse than useless.

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92 *Public Interest Disclosure Act 2013* (Cth), s 78(1).

93 *Public Interest Disclosure Act 2013* (Cth), s 78(3).

94 That is not to suggest that parliamentarians should not develop a rigorous understanding of explanation. Australians would be richer for it. For what it is worth, I would heartily commend Reutlinger's and Saatsi's *Explanation Beyond Causation: Philosophical Perspectives on Non-Causal Explanations* (Oxford University Press) as a worthy introduction.

[152] What are the members of the Senate Legal and Constitutional Affairs Committee to make of the provisions denying whistleblowers access to the judiciary, except where the decision-maker has acted in bad faith? Why have such sweeping immunities been included in the Bill?

[153] What are the parliamentarians who are expected to vote on the Bill to make of the provisions denying whistleblowers access to the judiciary, except where the decision-maker has acted in bad faith? Why have such sweeping immunities been included in the Bill?

[154] What is the community to make of the provisions denying whistleblowers access to the judiciary, except where the decision-maker has acted in bad faith? Why have such sweeping immunities been included in a bill purportedly designed to protect whistleblowers?

[155] The explanatory memorandum leaves me with the impression that the drafters of the Bill have not engaged in careful and thoughtful drafting. Rather, the impression left is that of slap-dash work. On having seen Part 4, Division 3 of the Bill, and having found nothing by way of explanation in the explanatory memorandum to the Bill, I formed the view that the drafters of the Bill have, likely, lazily transplanted section 33 from the *Ombudsman Act 1976* (Cth) into the Bill, without any regard for the purposes of the Bill or for the effect the transplanted provision will likely have on whistleblowers.[95] Is this the case?

[156] Objectively speaking, the quality of the Bill and materials in support leave much to be desired. Are the drafters of the Bill really interested in effectively dealing with wrongdoing, as they claim to be? Some might think that the drafters of the Bill are more interested in grandstanding than carefully and scrupulously thinking through the consequences of their proposals, and drafting legislation that best secures outcomes so that wrongdoing in the Commonwealth is effectively dealt with.

[157] While I believe that Senator Pocock and Senator Lambie have good intentions, good intentions, like bad intentions, are of cold comfort to whistleblowers affected by the impersonal consequences of the law. Like poor decisions, poor legislation is poor legislation, no matter what the intentions of the drafter may have been. It is in the execution, and not in the dreaming, that a cause is won.[96]

[158] In attempting to understand why Senators Pocock and Lambie have sought to severely limit their access to the judiciary, whistleblowers deserve to see, in the explanatory memorandum, more than a tepid restatement of the immunities contained in the Bill. So too do the parliamentarians, who will be called to vote on the Bill, and members of the community, who want to see wrongdoing and corruption in the Commonwealth dealt with effectively. All of them deserve a justification in respect of the immunities set out in the Bill worthy of the appellation *explanatory*.

[159] As it stands, Senators Pocock and Lambie have provided no explanation for including the sweeping immunities set out in the Bill. In the light of the incongruities noted above, it seems to me unjustifiable to include the sweeping immunities set out in the Bill. Should not the immunities set out in the Bill mirror the more modest immunities set out in section 78 of the *Public Interest Disclosure Act 2013* (Cth), which still give whistleblowers the right to seek review of decisions, and more, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)? Is that not a more balanced approach?

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95 On introducing the Bill into the Senate, Senator David Pocock noted, in the second reading speech, that the Parliament had fallen short of providing whistleblowers with necessary protections, such that those "risking their jobs, reputations, and safety to shine a light on wrongdoing" have "[f]or decades … had to fend for themselves." Denying whistleblowers access to the judiciary would compound the Parliament's failures and undermine the very purpose with which this Bill has been introduced by Senators Pocock and Lambie. Which begs the question … why?

96 Neither a former soldier nor a former international rugby player needs to be reminded that success is in the execution and not the dreaming. One is as likely to take a trench as he or she is to take victory at Eden Park with a grand dream and poor execution.

PART IV – THE SCOPE OF THE WPA'S ROLE AND THE REMUNERATION OF STAFF MEMBERS OF THE WPA

IV-A. Introductory comments

[160] On reading the totality of the Bill, I was struck by an injudicious concentration of authority in the proposed WPA.

[161] The Whistleblower Protection Commissioner and those assisting the Commissioner are, in respect of whistleblower protection issues or disclosures of wrongdoing, investigators,[97] advocates for whistleblowers,[98] advisors to Commonwealth officials,[99] and assessors of investigations in respect of disclosures of wrongdoing,[100] and more. All this is to be done, *competently*, with severely limited judicial oversight.[101]

[162] Two issues with the Bill are, thus, apparent. The first is the judiciousness of concentrating many functions in the hands of a single authority. The second is ensuring that these functions are carried out effectively.

[163] In respect of the first issue, my submissions will be cursory. It will soon be apparent why my submissions are cursory, and why cursory submissions are adequate.

[164] My submissions in respect of the second issue will be more developed but, in the light of my submissions on the first issue, may prove to be of more limited utility (which is not to say that the point made is without force).

IV-B. Concentrating many functions in a single authority

[165] As I noted, if the Bill is to become law, the Whistleblower Protection Commissioner and those assisting the Commissioner will, in respect of whistleblower protection issues or disclosures of wrongdoing, become investigators, advocates for whistleblowers, advisors to Commonwealth officials, and assessors of investigations in respect of disclosures of wrongdoing, and more.

[166] The WPA will, thus, wear many hats, and have obligations and duties in respect of many stakeholders.

[167] Aside from complaints about apparent conflicts of interest associated with the many functions that the Whistleblower Protection Commissioner, and those assisting the Commissioner, will, in respect of whistleblower protection issues or disclosures of wrongdoing, be called on to execute, with so many functions concentrated in a single authority, there is quite a bit that the authority's officials will be able to stuff up.

[168] By way of example, monitoring the way in which agencies deal with disclosures of wrongdoing, including by providing advice,[102] is amongst the many roles that the proposed WPA will have if the Bill is enacted.

[169] Suppose, as part of its role of monitoring the way in which agencies deal with disclosures of wrongdoing, one of the WPA's officials advances an incorrect proposition of law when providing advice

97 e.g. Bill, ss 10(1)(j), 22
98 e.g. Bill, ss 10(1)(d), 10(1)(g), 10(1)(i)
99 e.g. Bill, ss 10(1)(a), 10(1)(h)
100 e.g. Bill, ss 10(1)(f), 21(2).
101 Bill, s 64
102 Bill, s 10(1)(e)

to an agency.[103] On the basis of this incorrect advice, the investigating agency fails to properly consider the disclosure of wrongdoing, leaving the whistleblower aggrieved

[170] The whistleblower turns to the Bill and notes that one of the explicit functions of the WPA's Commissioner (and his or her delegates), which is "to ensure that appropriate support and protection is provided to persons who make disclosures of wrongdoing."[104] In such a scenario, what is a whistleblower to make of this function?

[171] In one fell swoop, one of the WPA's officials has managed to alienate a whistleblower, demonstrate his or her incompetence, undermine the confidence that officials in agencies have in the WPA's advice, and undermine the confidence of the public in a body designed to protect whistleblowers.

[172] Now, this is to say nothing of the assumption that the WPA's officials will execute *all* of their disparate functions *competently* and *according to law*.[105] The case studies referred to in these submissions, which pertain to the Commonwealth integrity agency that is responsible for the oversight of the federal public sector's whistleblower scheme,[106] demonstrate that the assumption is unwarranted.

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103 This is not a far-fetched scenario. Indeed, as these evidence supporting these submissions attest, something like this has occurred. In an investigation conducted under the *Ombudsman Act 1976* (Cth), Mr Mark Anstey, an official characterised as "a skilled and experienced senior investigator" (see https://archive.org/details/pid-2020-400006-2022-08-16-2021-104592-commonwealth-ombudsman-response-from-asst), advanced the erroneous legal proposition that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened." The result of this erroneous statement of law was that the Australian Public Service Commission's inadequate investigation of a whistleblower disclosure was never "properly investigated and dealt with", even though that the proper investigation of whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth) is an explicit purpose of that enactment: *Public Interest Disclosure Act 2013* (Cth), s 6(d).

104 Bill, s 10(1)(g)

105 Parliamentarians seem to labour under the belief that "because the Parliament has legislated that some thing or other be done, it will be done *according to law*." That we have a merits review system and a judiciary, both of which frequently determine that the actions of public officials are not lawful, is testament to the absurdity of that belief. What makes the drafters of the Bill think that the WPA's officials will be any better than other public servants in investigating, advocating, assessing, educating and judging?

106 The Parliament, in its wisdom, exalted the Office of the Commonwealth Ombudsman with the designation of a *Commonwealth integrity agency*: *National Anti-Corruption Commission Act 2022* (Cth), s 15. It also exalted the Australian Public Service Commission with the very same designation: *National Anti-Corruption Commission Act 2022* (Cth), s 15.

> One of the consequences of that act of exaltation is that the National Anti-Corruption Commission is precluded from commencing a corruption investigation into a corruption issue considered by the Australian Public Service Commission or, for that matter, any one of the bodies designated Commonwealth integrity agencies, unless the Commissioner is satisfied that it is in the public interest to do so: *National Anti-Corruption Commission Act 2022* (Cth), s 15. The public interest is what the Commissioner, or his delegates, think the public interest is.
>
> A corruption issue is a corruption issue, and a failure to investigate a corruption issue properly by an agency should not be affected by a fancy status bestowed on that agency. We have, in effect, a capricious fetter placed on the powers of the NACC, which is not informed by the primary purpose of the Act, which is to ensure corrupt conduct is properly investigated and dealt with. What difference does it make if the person who has, in the past, taken a gander at a disclosure of wrongdoing, which constitutes a corruption issue, and not dealt with it properly, worked in, for example, the Australian Public Service Commission (a Commonwealth integrity agency) instead of the Australian Law Reform Commission (not a Commonwealth integrity agency)? Why would the Parliament think that the status of an agency has any bearing on the proper investigation of a corruption issue? Is it the fallacy that *because the Parliament has legislated that some thing or other be done, it will be done according to law*?
>
> As expected, the explanatory memorandum to the National Anti-Corruption Commission Bill 2022 is useless in answering these questions. The explanatory memorandum contains a restatement of, rather than an explanation justifying, section 15 of the *National Anti-Corruption Commission Act 2022* (Cth):
> https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6917_ems_8ca94541-584a-4100-8c52-2be6478cf868%22

[173] The upshot? It is not a good idea to concentrate so many functions in a single authority, particularly where the powers granted to advance those functions are, in the main, discretionary.[107]

IV-C. Attracting the best talent

[174] In a speech delivered on 10 November 1949, Robert Menzies said the following in respect of the Commonwealth public service:[108]

> As it is true that governments can only distribute, by way of social services or otherwise, what the individual people of the nation have produced by their skill and effort, the productive forces of the nation must be maintained at their full strength, and the cost of government must not become too burdensome
>
> At the same time, we recognise that there must be an adequate force of government servants. ***That is why we continue to believe in a sufficient, well-organised, highly-trained, competent, and well-paid Civil Service.***

[175] Whatever the political persuasions of Australia's parliamentarians,[109] I take it that the former Prime Minister's commitment to a highly-trained, competent and well-paid civil service is shared by just about every member of the Parliament.

[176] Of course, what passes for highly-trained, competent or well-paid may be subjects of contention, but that is not to say that members of the Parliament are not committed to these, at times, vague concepts.

[177] Whether or not members of the Senate's Legal and Constitutional Affairs Committee are committed to the nature of Australia's economic order, the fact is that Australia operates according to relatively liberal market principles. A concomitant of this economic reality is that the concept of a well-paid civil servant is measured relative to the remuneration on offer in the market place for the skills that the civil servant is expected to apply.

[178] It is, at this juncture, worth asking why a whistleblower protection authority is being brought into existence. The functions of the Whistleblower Protection Commissioner provide relevant insight the premisses are that disclosures of wrongdoing are not being properly dealt with, and that those who make such disclosures are unsupported.

[179] The authority is to be brought into existence to, amongst other things, ensure, by way of review or otherwise, that those tasked with the authority to investigate whistleblower disclosures are doing that, according to law and best practice. To put it at a higher level of generality, the WPA's role is one of oversight.

[180] In the public mind, the archetypal oversight bodies have been the courts and tribunals Historically, and to this day, those who constitute such bodies have been well-remunerated.[110] Much more often than not, those bodies have provided affected members of the community with lawful and

107 It is also worth noting that many of the powers vested in the Whistleblower Protection Commissioner, and the staff supporting the Commissioner, are *discretionary* in nature Reasonable minds will differ on the exercise of discretionary powers, which is to say that the legislation is pregnant with the seeds of its discreditation When those powers are exercised in a way that is not in favour of whistleblowers, there will be those who will howl that the WPA has failed in its mandate When those powers are exercised in favour of whistleblowers, particularly in a way that is critical of government agencies, agencies will howl that the WPA is not impartial, and is, in reality, an advocate for whistleblowers and, on account of its seeming partiality, unworthy of respect.

108 https://electionspeeches.moadoph.gov.au/speeches/1949-robert-menzies

109 I take for granted that our parliamentarians are committed to some form of parliamentary government. Anything otherwise, such as anarchy, is unconstitutional.

110 A casual glance at, for example, the *Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2024* should convince the reader of that fact.

reasonable decisions. Other than in the most exceptional circumstances, well remunerated judges ensure that decisions made by civil servants are made according to law. Moreover, and overwhelmingly, well remunerated tribunal members ensure that decisions made by civil servants are the best on their merits.

[181] Often, tribunal members will overturn decisions of civil servants on account of errors of fact, errors of law or issues of merit. Often, courts will quash decisions on account of errors that are within the jurisdiction of the court to remedy.

[182] Australians put a great deal of faith in the judiciary and their tribunals. When these institutions lapse into error, those errors are not well suffered. That is because these institutions are institutions of oversight. Each, in its own way, and within the bounds of its institutional competence, will correct errors.

[183] Much like these institutions of oversight, the WPA is being brought into existence to ensure, amongst other things, that errors made by investigators in Commonwealth agencies are remedied, and that best practice is cultivated. In other words, the community will not suffer errors on the part of the WPA well.

[184] In order to competently execute their functions, the WPA's officials are going to need skills that are in high demand. Amongst other things, those skills will include the ability:

a) to gather evidence; and

b) to critically assess evidence for relevance and probative value; and

c) to understand and correctly apply the law; and

d) to exercise discretionary powers judiciously and reasonably; and

e) to articulate, clearly and coherently, reasons in support of decisions; and

f) to reason logically.

[185] These skills are, sadly, not readily available.[111]

[186] Even those who have legal training and, at least amongst ordinary members of the community, would be expected to have a command of such skills do not have an adequate command of these skills.[112]

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111 In fact, the WPA's officials are going to need "appropriate specialist training and experience in the provision of legal, administrative, investigative, psychological and workplace-related advice, guidance and support" to undertake some of their tasks: Bill, s 20(3). Someone has to pay for these skills.

112 Consider, for example, Ms Cassandra Hodzic, the Ombudsman's delegate who terminated an investigation into the Australian National University's handling of a whistleblower disclosure by Professor Peter Tregear.

Cassandra Hodzic is a graduate of the University of Adelaide's law school. Ms Hodzic secured a number of prizes and commendations while in law school, including the Sparke Helmore Prize for Immigration and Refugee law in 2011 (https://www.yumpu.com/en/document/read/39119871/teaching-report-2011-use-this-one-7editpub-the-adelaide-law), and was a student editor of the Adelaide Law Review (see, for example, *Adelaide Law Review*, Volume 33, Number 1 (2012) - https://law.adelaide.edu.au/system/files/media/documents/2019-02/alr-vol-33-1.pdf).

Despite her achievements and her legal training, as noted in part II D2 of these submissions, Ms Hodzic's reasons were affected by fallacies. She also, demonstrably, failed to exercise discretionary powers judiciously and reasonably when she refused to exercise her powers to compel the production of information, even when she effectively conceded that the whistleblower, Professor Peter Tregear, was apparently denied procedural fairness by those who investigated the public interest disclosure he submitted to relevant officials at the Australian National

[187] Since the WPA is not in operation, I am unable to draw on position descriptions from that proposed agency. That said, I am able to draw on position descriptions for roles in the closest thing the Commonwealth has to a whistleblower complaints authority – the Office of the Commonwealth Ombudsman.

[188] Suppose that I am a graduate of an Australian law school, with more than a few gongs under my belt. I have graduated to the degree of a Bachelor of Laws with first class honours and am looking to secure a job in the workforce.

[189] I peruse the Public Service Gazette and notice a job at the Office of the Commonwealth Ombudsman. The Commonwealth Ombudsman is looking for an assessment officer.[113] According to the vacancy notification, the role is ideally suited to recent graduates in law, criminology or international relations.[114] The classification for the role is, in accordance with the *Public Service Classification Rules 2000* (Cth), set at APS 4.[115] The remuneration on offer is $76,351.[116]

[190] I then get a call from a friend who encourages me to read an article published by Maxim Shanahan in the Australian Financial Review.[117] According to the article, "The nation's eight major law firms will pay all Sydney-based graduates at least $100,000 for the first time this year, as competition for young lawyers defies a broader labour slowdown in the industry."

[191] If I choose to go into the private sector, I will be paid about $25,000 more for my base salary than I would going into the public sector. The prospects of career advancement are also better in the private sector and the remuneration on offer is substantially more than that on offer in the public sector.[118]

University

113 A vacancy notice was published in the Public Service Gazette for an assessment officer in the Office of the Commonwealth Ombudsman on 9 May 2025. The relevant gazette is PS 18 of 2025. The relevant vacancy notification reference is VN-0758177. The vacancy notification is set out on pages 39 – 42 of PS 18 of 2025. A digital copy of the gazette is accessible on the APSjobs website: https://s3-ap-southeast-2.amazonaws.com/apsc-gazette/PS18+Daily+Gazette+Friday+-+09+May+2025.pdf.

114 VN-0758177 - https://www.apsjobs.gov.au/s/job-details?id=a05OY00000CbQ6JYAV

115 VN-0758177 - https://www.apsjobs.gov.au/s/job-details?id=a05OY00000CbQ6JYAV

116 VN-0758177 - https://www.apsjobs.gov.au/s/job-details?id=a05OY00000CbQ6JYAV

In accordance with the *Office of the Commonwealth Ombudsman Enterprise Agreement* [2024] FWCA 1118, a person will commence at the base increment in a relevant classification before advancing to a higher increment: https://www.ombudsman.gov.au/__data/assets/pdf_file/0019/302950/The-Office-of-the-Commonwealth-Ombudsman-Enterprise-Agreement-2024-2027.pdf.

117 Maxim Shanahan, "Law graduates are about to crack a salary record", *Australian Financial Review*, 16 May 2024 <https://www.afr.com/companies/professional-services/law-graduates-are-about-to-crack-a-salary-record-20240509-p5jba3>.

118 It is no accident that the remuneration on offer at the Australian Government Solicitor (**AGS**) is substantially higher than the remuneration on offer at other government agencies.

Consider the pay on offer for an Executive Level 2 lawyer at the AGS. According to the *Attorney-General's Department Enterprise Agreement 2024* (https://www.ag.gov.au/sites/default/files/2024-03/agd-enterprise-agreement-2024.PDF), the salary range of an Executive Level 2 lawyer in the AGS is between $143,987 and $237,893. This is, of course, to say nothing of the apparent use of independent flexibility arrangements, under the *Fair Work Act 2009* (Cth), to bump up the pay of Executive Level 2 AGS lawyers: see, for example, *2023-24 Annual Report of the Attorney-General's Department*, page 156 (https://www.ag.gov.au/sites/default/files/2024-10/annual-report-2023-24.pdf).

The pay on offer for an Executive Level 2 lawyer at the AGS is substantially higher than the pay on offer for Executive Level 2 officials in the Office of the Commonwealth Ombudsman. According to the *Office of the Commonwealth Ombudsman Enterprise Agreement* [2024] FWCA 1118 (https://www.ombudsman.gov.au/__data/assets/pdf_file/0019/302950/The-Office-of-the-Commonwealth-Ombudsman-Enterprise-Agreement-2024-2027.pdf), the salary range of an Executive Level 2 official, including a lawyer, in the Office of the Commonwealth Ombudsman is between $137,289 and $155,611.

[192] The remuneration on offer has an appreciable effect on my quality of life, which is to say nothing of the prestige of working for a top-tier firm.[119]

[193] All else being equal, [120] as a rational decision maker, I choose to enter a relationship of employment with the top-tier firm.

[194] Indeed, the norm is for the best and brightest law graduates to end up in the top-tier firms or at the state or territory bars. That means that the pool of graduate lawyers available to fill the assessments officer role at the Office of the Commonwealth Ombudsman is reduced to those who are not the best and brightest.

[195] To be clear, I am not suggesting that competitive and, thus, higher remuneration will necessarily secure the best and brightest for the WPA. There is every chance that a person lacking the appropriate command of the skills required might be employed. But, as a class, the quality of employees available to the WPA will be of a higher calibre than the comparable class in, for example, the Office of the Commonwealth Ombudsman on account of the superior remuneration on offer. That is just market economics in action.

[196] I take it that the drafters of the Bill have high hopes for the WPA. I think that many Australians will share those high hopes.

[197] Alas, I fear that those hopes will, without careful consideration of the remuneration on offer for officials in the WPA, be dashed rather quickly.

[198] Australia has a judiciary that is the envy of the world. As I have intimated, that is, in no small measure, because Australians are prepared to remunerate their judges well.

[199] Despite the recent travails with the Commonwealth's merits review tribunals, Australia also has a robust and effective administrative merits reviews system, which is, in no small measure, robust and effective because Australians are prepared to remunerate their tribunal members well

[200] In the light of the case studies referred to in these submissions, Australians cannot say that the body responsible for oversight of the Commonwealth's whistleblower regime is robust or effective in its handling of complaints of inadequately investigated whistleblower disclosure under the *Public Interest Disclosure Act 2013* (Cth).[121] I submit that this is, in no small measure, a consequence of not being able

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119 The more I make, the more I have to spend. For example, compared to the officer in the Office of the Commonwealth Ombudsman, I will be able to sooner save for a home closer to the centre of the city, which, incidentally, may be location of both the Office of the Commonwealth Ombudsman and the tip-tier law firm

120 Obviously, that is not the case. As I just noted, the prestige of working at a top-tier firm is another factor that draws the best and brightest to those firms. Prestige is a powerful draw-card, and so much so that people will part with money for prestige. Many associates to Justices of the High Court of Australia, or Judges of the Federal Court of Australia or the State Supreme Courts, will take hefty cuts in pay for the experience of working as an associate. Why are these institutions prestigious? I submit that it has quite a bit to do with the fact that Australians remunerate their judges well (not just salaries, but access to defined benefits schemes, access to well furnished workplaces, access to amazing legal resources, the right to title "the Honourable" for life, the privilege of lounging in dark, silken muumuus in the workplace etc.).

121 In case somebody wants to take issue with the fact that the case studies represent too small a sample from which to draw conclusions about the efficacy of the Office of the Commonwealth Ombudsman in executing its functions, I refer that person to chapter 21 of the Report of the Royal Commission into the Robodebt Scheme https://www.royalcommission.gov.au/robodebt/report

Considering that it is not possible to sue the Commonwealth Ombudsman for anything other than decisions made in bad faith or decisions affected by jurisdictional error, there are few court cases that I am able to refer readers to. Nonetheless, an application for judicial review was successful in the Federal Court of Australia as recently as 12 March 2024. In NSD 1076 of 2023, Mr Eli Turner, a former member of the Australia Defence Force, secured certiorari and mandamus because the Ombudsman's delegate failed to exercise his jurisdiction. In the Court's

to attract the best talent to undertake the work of the Commonwealth Ombudsman because the remuneration offered is inferior to alternatives in the employment market

[201] While good governance depends on well-remunerated civil servants, nothing in the Bill suggests that the question of competitive remuneration has been considered by the drafters of the Bill [122] The only matter considered in the Bill in respect of employment in the WPA is that officials be engaged under the *Public Service Act 1999* (Cth).[123] This is concerning in the light of the apparent expectations and hopes that the drafters of the Bill have for the WPA.

[202] Without competitive remuneration, the WPA, a prospective oversight body, is less likely to attract high quality talent, and, without that talent, the WPA will be forced to secure the employment of individuals who are less likely to have an adequate command of the skills needed and expected for this body Naturally, that lack of skill will inevitably be reflected in the work of the WPA

[203] Whistleblowers do not need another Office of the Commonwealth Ombudsman Nor, in an era of flagging productivity and trust in government, do the Australian people need another bloated agency functioning as a drain of their resources.

PART V – MISCELLANEOUS OBERVATIONS ABOUT THE BILL

V-A. Parliamentary Joint Committee on the Whistleblower Protection Authority

[204] While I have reservations about various aspects of the Bill, as a matter of principle, I think it laudable to a have a parliamentary committee with oversight of whistleblower issues.

PART VI – PROPOSALS AND SUGGESTIONS IN RESPECT OF THE BILL

VI-A. Introduction

[205] Plainly, I have concerns about the Bill.

[206] My concerns mainly relate to:

> a) the conceptual breadth of a *whistleblower protection issue*, defined in subsection 8(1) of the Bill, and the implications of the breadth of that concept (particularly with respect to the role of the Office of the Commonwealth Ombudsman); and
>
> b) the proposed immunities, set out in Part 4, Division 3 of the Bill, of staff members and persons assisting the WPA; and
>
> c) the remuneration of staff members of the proposed WPA, and the scope of the WPA's role

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orders, Justice Perry noted that the Commonwealth Ombudsman "concedes that the decision dated 31 August 2023 is affected by jurisdictional error because the delegate erred in the exercise of their discretion by concluding that the 'Office is limited to considering the reported conduct, rather than the impact of the abuse' and that this error was material." The Court's order can be accessed on the Commonwealth Courts portal, https://www.comcourts.gov.au/file/Federal/P/NSD1076/2023/3965406/event/31721986/document/2245763

122 In a market economy, the substance of "well" in the term *well-remunerated* is, at any point in time, either relative to the highest remuneration on offer for the same skills in that market or constituted by an amount higher than the mean remuneration on offer for the same skills in that market. Either way, the substance of "well" in the term *well-remunerated* is market dependent.

123 Bill, s 60(1).

[207] For the reasons that I have set out in these submissions, I do not think it would be wise for the Bill to be enacted in its current form

[208] That said, I think that there is a need for positive change sooner rather than later That positive change can, in my opinion, be effected with some modest legislative reforms, and non-legislative actions, while root and branch reforms across the Commonwealth's legislative landscape relating to whistleblowing are considered.

[209] I will set out those proposals for modest legislative reform, and non-legislative action, in this part of the submissions.

VI-B. The Office of the Commonwealth Ombudsman's oversight of the Public Interest Disclosure scheme

[210] In part II of these submissions, I have set out my concerns about the overlapping roles that the Whistleblower Protection Commissioner and the Commonwealth Ombudsman would have in respect of complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth).

[211] In my opinion, the Commonwealth Ombudsman should retain his jurisdiction to administer the whistleblower scheme under the *Public Interest Disclosure Act 2013* (Cth), as well as his jurisdiction to consider complaints about inadequate public interest disclosure investigations. That said, some substantive developments in the law would be welcome

VI-C. Institution an Inspector for the Public Interest Disclosure scheme

VI-C1. Introduction

[212] Just as the National Anti-Corruption Commissioner has an inspector, so too, I submit, should there be an inspector for the public interest disclosure scheme.

[213] The role of the inspector would be focussed. The inspector would not have sweeping discretionary powers.

[214] As I see it, the role of the inspector would be to assess, upon receiving applications, whether the Commonwealth Ombudsman or his staff members are approaching the task of conducting investigations, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in respect of complaints received about inadequacies in investigations conducted under the *Public Interest Disclosure Act 2013* (Cth), in a manner that reflects best practice [124]

124 The Ombudsman's, and his officials', failure to exercise their powers as intended was the subject of sustained inquiry and criticism during the Robodebt Royal Commission Unfortunately, because there is such little oversight of the way that the Ombudsman and his officials operate, it took a Royal Commission to expose the incompetence and timidity of officials in the Office of the Commonwealth Ombudsman (as to which, please refer to chapter 21 of the Report of the Royal Commission into the Robodebt Scheme https:// www.royalcommission.gov.au robodebt report) Perhaps the most disturbing revelation from the Robodebt Royal Commission was the lengths to which officials in the Office of the Commonwealth Ombudsman went to sacrifice the independence of that office The case studies referred to in these submissions serve to further support the view that officials in the Office of the Commonwealth Ombudsman are failing to apply the law as it was intended by the Parliament, and are letting down whistleblowers in the process.

Ironically, the Commonwealth Ombudsman chastised the public service in his report *Room for Improvement Observations from the Ombudsman*, for failing to apply the law as intended by the Parliament see, Iain Anderson, *Room for Improvement· Observations from the Ombudsman*, 3 September 2023 <https:// www.ombudsman.gov.au data assets pdf file 0019 300475 Room-for-Improvement-Observations-from-the-Ombudsman.pdf > (accessed on 30 June 2025).

[215] Essentially, the role of the inspector would be one of partial *merits review*[125]

[216] Specifically, the inspector will consider the merits of decisions made, under the *Ombudsman Act 1976* (Cth), section 55 of the *Public Interest Disclosure Act 2013* (Cth), subordinate legislation and policy, to determine whether the Ombudsman or his officials have undertaken their tasks in a manner that meets community expectations and the mandate the Ombudsman was given, by the Parliament, to ensure that investigations conducted under the *Public Interest Disclosure Act 2013* (Cth) are being conducted such that the disclosures are being properly investigated and dealt with (i.e. in accordance with the explicit purpose set out in paragraph 6(d) of the *Public Interest Disclosure Act 2013* (Cth)).

[217] Upon assessment, the inspector would be empowered to issue directions to the Ombudsman or his officials about how the Ombudsman's investigation might require reconsideration.

VI-C2. Establishing the office of the inspector of the public interest disclosure scheme

[218] For the sake of statutory "cleanliness", my view is that the *Ombudsman Act 1976* (Cth) should ***not*** be amended to establish the office of the inspector of the public interest disclosure scheme. Rather, a free standing piece of legislation should be the basis for establishing the position of inspector of the public interest disclosure scheme.

[219] The legislation should establish the office of the inspector of the public interest disclosure scheme. The inspector would be a statutory office holder for the purposes of the *Public Service Act 1999* (Cth), which means that inspector would be bound by the APS Values.[126]

[220] The new enactment would provide that *administrative* staff members (e g. an executive assistant to the inspector, IT support, a review intake officer etc.) assisting the inspector must be persons engaged under the *Public Service Act 1999* (Cth), and made available to the inspector by the Secretary of the Attorney-General's Department. In other words, the "agency head" responsible for the *administrative* staff supporting the inspector would be the Secretary of the Attorney-General's Department.

[221] While I think it ultimately a matter for the Legal and Constitutional Affairs Committee, for the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth), there would be good sense in explicitly setting out how the Secretary of the Attorney-General's Department would be responsible for catering to the needs of the inspector, by entering into arrangements, such as contracts, on behalf of the Commonwealth, in furtherance of the inspector's work.

[222] The inspector would be appointed by the Governor-General on the recommendation of the Attorney-General, following approval of the candidate by a joint parliamentary committee. The appointment should be for a maximum of five years, and the Governor-General should be able to reappoint a person to the position of inspector on the recommendation of the on the recommendation of the Attorney-General, following approval of the candidate assessor by a joint parliamentary committee, subject to the joint parliamentary committee approving of the nomination for re-appointment.

[223] The minimum qualifications for appointment as inspector should be:

> a) enrolment and practise as an Australian legal practitioner for at least seven years, with considerable experience practising in administrative law;[127] or

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125 I say *partial* merits review because the review contemplated would not be *de novo* review (in the sense that the inspector would step into the proverbial shoes of the original investigator and conduct the investigation)

126 *Public Service Act 1999* (Cth), s 14

127 I use the term Australian legal practitioner in the way that term is used in the *Legal Profession Uniform Law*, which is set out in Schedule 1 of the *Legal Profession Uniform Application Act 2014* (Vic). Practical experience practising as a lawyer is, I think, important, which is why I have not suggested that the person merely be enrolled as a legal practitioner for five years.

b) past service as a Judge of the Federal Court of Australia, or a State or Territory Supreme Court,

in addition to the consent of the person being nominated by the Attorney-General.[128]

VI-C3. Assessors of the Office of the Inspector of the Public Interest Disclosure Scheme

[224] The enactment would also establish the positions of assessors (or whatever other title the Parliament thinks appropriate). The assessors would ***not*** be engaged under the *Public Service Act 1999* (Cth). Assessors would be, like sessional members of the Administrative Review Tribunal, appointed by the Governor-General on the recommendation of the Attorney-General, following approval of the candidate assessor by a joint parliamentary committee. Naturally, the enactment ought to provide minimum qualifications for appointment, such as:

a) enrolment and practise as an Australian legal practitioner for at least five years, with considerable experience practising in administrative law;[129] or

b) appointment as a general member, senior member or a non-judicial deputy president of the Administrative Review Tribunal, with experience and skills that, in the opinion of the Attorney-General, makes the relevant member of the Administrative Review Tribunal an appropriate candidate for appointment as an assessor; or

c) appointment as an officer of a State or Territory review tribunal (e.g. the Queensland Civil and Administrative Tribunal), with experience and skills that, in the opinion of the Attorney-General, makes the relevant officer an appropriate candidate for appointment as an assessor; or

d) professional experience and skill that, though not captured in points a), b) or c), makes the relevant person an appropriate candidate for appointment as an assessor,'[130]

in addition to the consent of the person being nominated by the Attorney-General.

[225] Importantly, the enactment will provide that the pay of assessors, all of whom are to be engaged to work on a sessional basis, will be determined by the Remuneration Tribunal. I envisage that the pay structure will be similar to that of sessional members of the of the Administrative Review Tribunal, which is set out in the *Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2024*. In other words, assessors would be paid using daily rates and called on by the inspector as an when work is available.

VI-C4. Grounds of review

[226] The grounds of merits review of decisions of the Commonwealth Ombudsman or officials in the Office of the Commonwealth Ombudsman pertaining to investigations, under the *Ombudsman Act 1976*

128 I should hate to think that a person might be nominated, approved by the joint parliamentary committee, appointed by the Governor-General, only for that person's consent to the nomination and appointment to have never been provided.

129 I use the term Australian legal practitioner in the way that term is used in the *Legal Profession Uniform Law*, which is set out in Schedule 1 of the *Legal Profession Uniform Application Act 2014* (Vic). Practical experience practising as a lawyer is, I think, important, which is why I have not suggested that the person merely be enrolled as a legal practitioner for five years.

130 This final catch all provision, which contrasts against the more concrete and specific qualifications set out in the points prior, would be relied on by the Attorney-General to recommend, for example, an academic with years of experience teaching administrative law, or a legal practitioner with considerable experience in *corporate* (i.e. not administrative) law, but with a focus on whistleblower disclosures made under the *Corporations Act 2001* (Cth), or an Australian legal practitioner who, while an expert in the field of administrative law, has not been enrolled as a legal practitioner in Australia for 5 years (though has many years of experience practising in the field of administrative law in, for example, New Zealand or Singapore), etc.

(Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), of complaints about inadequacies in the investigation of whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth) would be, broadly, four fold. They would be:

a) a failure to meet best practice in respect of making administrative decisions under relevant enactments, and/or

b) a failure to exercise, without adequate justification, powers to compel the production of evidence or materials, particularly where the context of the complaint suggests that the exercise of such powers would be warranted; and/or

c) acts or omissions of relevant officials being unreasonable, unjust, or oppressive in their effects, irrespective of whether the acts or omissions are lawful or unlawful, and/or

d) unlawful conduct.

[227] Naturally, errors of law or fact would be caught by these grounds. So too would, for example:

a) failing to take relevant evidence into consideration; or

b) taking irrelevant evidence into consideration; or

c) failing to take logically probative evidence into consideration; or

d) taking evidence into consideration that is not logically probative.

VI-C5. Review intake

[228] In my view, the relevant legislation should provide that where a whistleblower:

a) wishes to submit an application for review about the way the Ombudsman or one of his officials handled a complaint about the inadequacies of an investigation under the *Public Interest Disclosure Act 2013* (Cth); or

b) has submitted an inadequately articulated application for review,

the inspector will make arrangements, through members of his or her staff (i.e. the complaints intake officer (who might also be the executive assistant to the inspector, or the office manager – that is a resource management matter)) to assist the whistleblower to submit an application for review in an appropriate manner.

[229] I also think that there is considerable merit in including a provision allowing a person to represent the whistleblower in his or her dealings with the inspector's office, so long as the whistleblower provides the inspector with such an authorisation in writing, and the authorisation is to the satisfaction of the inspector.

VI-C6. Powers to compel the production of information or artefacts

[230] The inspector, and each and every assessor, should be able to compel the production of any and all artefacts, including documents, in the control of the Office of the Commonwealth Ombudsman that relate to the application for review submitted.

[231] The inspector, and each and every assessor, should be able to compel the Commonwealth Ombudsman and other officials in the Office of the Commonwealth Ombudsman to provide any and all information that relates to the application for review submitted.

[232] The law should also provide that the inspector, and each and every assessor, may compel the Commonwealth Ombudsman and other officials in the Office of the Commonwealth Ombudsman to appear before them and, on oath or affirmation, provide evidence.

VI-C7. Decision-maker

[233] While ultimately a matter for the Parliament, I think it sensible for the *formal* decision maker, in respect of *all* decisions pertaining to the manner in which the Ombudsman or his staff have handled complaints about inadequate whistleblower disclosure investigations, under the *Public Interest Disclosure Act 2013* (Cth), to be the inspector.

[234] In line with that view, assessors will, as part of their work, consider applications for review, conduct investigations and prepare their reasons, and submit their reasons and evidence in support to the inspector for the inspector's consideration. Once considered, the inspector may:

> a) endorse the reasons in full, such that the reasons form the basis of his or her decision; or
>
> b) amend the reasons so that they reflect the views of the inspector, and then use the amended reasons as the basis for his or her decision; or
>
> c) return the reasons to the assessor and ask the assessor to look further into issues of concern before the reasons are again submitted to the inspector for further consideration.

[235] Naturally, views may differ, and some may think it appropriate for the assessors to be decision makers. If so, a provision should be included in the legislation that the inspector is not permitted to direct assessors in the manner in which they make their decisions (i.e assessors should be *independent* decision makers).

VI-C8. Publishing decisions and reasons for decision

VI-C8.1. Introduction

[236] Given that the role of the inspector will be to assess the merits of how the Ombudsman or his officials have considered applications for review lodged about the manner in which investigations of whistleblower disclosures have been handled under the *Public Interest Disclosure Act 2013* (Cth), the inspector would not be dealing with the substance of the allegations of wrongdoing contained in the whistleblower disclosure. The inspector's role is, rather, to deal with the merits of complaints handling process. As such, the substance of the any decision made by the inspector would be about good administrative decision making by officials in the Office of the Commonwealth Ombudsman

[237] In my opinion, the legislation should explicitly provide that the inspector *must* publish, on the inspector's webpage, each and every one of his or her reasons for decision in respect of applications for review of decisions made by the Ombudsman or his officials pertaining to complaints of inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth). Each decision should bear an appropriate unique identifier.[131] [132]

131 For example, the identifier may be in the nature of medium neutral citations utilised by the Australian Information Commissioner in respect of decisions issued by the Information Commissioner, or the Freedom of Information or Privacy Commissioners.

132 The concept of medium neutral citations is set out in the Australian Institute of Judicial Administration's *Guide to Uniform Production of Judgments* (1999), edited by the Hon L T Olsson. I commend that work to the Legal and

VI-C8.2. Proposed provisions

[238] The enactment should provide that:

> a) the inspector must publish his or her reasons within 90 days after delivering those finalised reasons to the person who submitted the application for review,[131] and
>
> b) the inspector may apply use pseudonyms for whistleblowers, third parties who are not public-servants (or who have been public servants but are not connected with the issues identified in the application for review) and, where appropriate, officials in the Office of the Commonwealth Ombudsman;
>
> c) the inspector may apply redactions to *sensitive personal information*, as defined in the *Privacy Act 1988* (Cth).

VI-C8.3. No power to redact reasons for decision, other than in respect of sensitive personal information

[239] The enactment should also provide that the inspector is not permitted to redact anything other than *sensitive personal information* in his or her reasons for decision. In other words, references to the titles of documentary evidence, the substance of evidentiary materials considered, and the like, must not be redacted

VI-C8.4. Alternative proposal with respect of the inspector's powers to redact reasons for decision

[240] If, contrary to the submission set out above, legislators are of the view that the inspector should have the authority to redact reasons for decision published on the inspector's website, I submit that the powers should be qualified, and subject to institutional checks.

VI-C8 4.1. Power to redact only in exceptional circumstances

[241] I submit that any provision in respect of the inspector having the power to redact should provide that the inspect must not redact anything in her reasons for decision, unless he or she is convinced that *exceptional circumstances* exist for redacting that data.

[242] In considering the meaning of *exceptional circumstances*, the legislation should, in my opinion, limit the discretion open to the inspector to identifiable grounds. As I see it, those limited grounds should include

> a) documents that are Cabinet in confidence; and
>
> b) documents, the disclosure of which would constitute a contempt of the Federal or State Parliaments, or the courts of Australia; and
>
> c) documents affecting enforcement of law and protection of public safety (as defined in section 37 of the *Freedom of Information Act 1982* (Cth).

[243] I would counsel against the proliferation of relevant grounds I would be disappointed if, for example, the exemptions set out in Part IV, Division 2 of the *Freedom of Information Act 1982* (Cth) were to be transplanted *tout-court* as grounds that the inspector should consider in determining whether the most exceptional circumstances exist for redacting data from his or her decisions.

Constitutional Affairs Committee.

133 I think the 90 days provided to the inspector should be enough time for the inspector to consider any redactions that should be applied, in the light of the legislated standard.

VI C8 4 2 Unredacted copies of redacted reasons for decision must be provided to the joint parliamentary committee

[244] If the inspector is provided with the power to redact reasons for decision is exceptional circumstances, then the enactment should provide that unredacted copies of each of the redacted reasons for decision must be provided to the joint parliamentary committee with oversight of the inspector's work in respect of each relevant reporting period.[134]

[245] The enactment should also provide that, by default, the unredacted copies of each of the redacted reasons for decision must, upon being provided to the joint parliamentary committee for the relevant reporting period, be tabled during the relevant hearing unless the inspector advances a public interest immunity claim in respect of the tabling of the relevant reasons for decision.[135]

[246] There is at least one strong justification for the provision, to the joint parliamentary committee, of unredacted copies of each of the redacted reasons for decision, which is that provision of the unredacted reasons for decision provides the members of the committee with the opportunity to monitor the frequency and basis of the use, by the inspector, of the power to redact reasons for decision in *exceptional circumstances*.[136] On a more general level, the members of the committee will have access to information about how an integral part of the Commonwealth's public sector whistleblowing scheme is actually operating, which is a far cry from the existing state of affairs.[137]

VI-C9. Power to issue directions to the Commonwealth Ombudsman or his officials, and offences for failing to comply

[247] I submit that the legislation should provide that the Commonwealth Ombudsman and his officials ***must*** comply with any directions issued as part of the inspector's decision in respect of an application for review.

[248] Subject to a timely application to a court of competent jurisdiction for a stay of the directions given by the inspector, with a view to setting the directions aside for reviewable error, a failure to comply with the inspector's directions or decision, by the Commonwealth Ombudsman or his officials, should be an offence, punishable by 3 months in prison, or a fine of $5,000, or both. Naturally, since the Governor-General may either:

> a) suspend the Commonwealth Ombudsman from office on the ground of misbehaviour;[138] or
>
> b) remove the Commonwealth Ombudsman from office on an address praying for his or her removal on the ground of misbehaviour being presented to the Governor-General by each House of the Parliament in the same session of the Parliament,[139]

134 Further submissions will be made in respect of a joint parliamentary committee, and its powers and functions, in part IV of these submissions.

135 Further submissions will be made in respect of public interest immunity claims in part IV of these submissions

136 Naturally, should the inspector's view of what constitutes *exceptional circumstances* not align with the views of members of the joint parliamentary committee, members of the committee may be able to consider, from an informed position, the desirability of amendments to the legislation giving the inspector the power to

137 I noted, at the beginning of these submissions, that the Senate's Legal and Constitutional Affairs Committee had been, in effect, tasked with assessing a Bill about how whistleblowers and their disclosures are dealt with without having access to a comprehensive and objective base of evidence of the way in which whistleblowers and their disclosures are actually dealt with by federal agencies and corporations, and how that state of affairs had handicapped the Senate's Legal and Constitutional Affairs Committee. I think it would be irresponsible to perpetuate such handicaps where it is possible, through sensible legislative drafting, to eliminate them, or, at least, mitigate the effects of such handicaps.

138 *Ombudsman Act 1976* (Cth), s 28(2)

139 *Ombudsman Act 1976* (Cth), s 28(1).

the Commonwealth Ombudsman will have plenty of incentive to comply with the directions and or decisions of the inspector.

[249] Similarly, the Ombudsman's officials will have plenty of incentive to comply with the directions or decisions of the inspector given that they might end up in prison or be forced to part with their money

[250] The legislation should make clear that the Ombudsman or his officials must comply with the directions or decision of the inspector within the time permitted by the inspector. If the directions or decision do not set out a time for compliance, the legislation should make clear that compliance is to be within 30 days of the Commonwealth Ombudsman being *personally* notified of the decision.[140]

[251] It should also be made clear, in the legislation, that any member of the public will have a right to notify the Australian Federal Police that the Commonwealth Ombudsman or one of his officials has failed to comply with the directions or decision of the inspector.

VI-C10. Judicial review

[252] As with other administrative decisions, I think that the decisions of the inspector should be amenable to judicial review under the ADJR Act. Filing fees and costs associated with such proceedings should be what they ordinarily are.[141]

VI-C11. Extending this model to complaints handled by the IGIS

[253] I noted at the start of these submissions that disclosures of information for the purposes of Part 9.4AAA of the *Corporations Act 2001* (Cth), while being covered by the Bill, are beyond the scope of these submissions.

[254] The focus of these submissions has been on the whistleblower scheme for the public service.

[255] The IGIS has oversight of the public services' whistleblower scheme in respect of the intelligence community

[256] I think it is a matter for the Committee and, ultimately, the Parliament to consider whether the model of having a merits review official in respect of the way that the IGIS handles complaints about inadequately investigated public interest disclosures is appropriate.

[257] I will not provide submissions, one way or another, on the desirability of extending the model proposed in part VI.B2 to the IGIS in these submissions.

VI-C12. Freedom of information

[258] It should be made clear, in the relevant legislation, that the inspector's documents may be the subject of access applications under the *Freedom of Information Act 1982* (Cth). Naturally, documents pertaining to the administrative staff and functions of the Office of the Inspector of the Public Interest Disclosure Scheme will be subject to applications, under the *Freedom of Information Act 1982* (Cth), to the Attorney-General's Department.

140 Notification need not be by personal service, an email or letter should suffice. As a matter of policy, the inspector should ensure that each and every decision, issued in respect of an application for review, be sent to the Commonwealth Ombudsman's government issued email address. Presumptions about the receipt of emails are set out in the *Electronic Transactions Act 1999* (Cth), s 14A

141 The significance of this observation will come into focus when I address the judicial review of decisions under the *Public Interest Disclosure Act 2013* (Cth) and the *Ombudsman Act 1976* (Cth).

VI-C13. Reporting obligations

[259] The relevant enactment should set out the reporting obligations that apply in respect of the work of the inspector.

[260] The inspector should be required to prepare biannual reports. Data in the biannual reports prepared by the inspector should include, amongst other things:

> i) the number of applications for review received in the relevant reporting period; and
>
> ii) the number of decisions made in respect of applications for review in the relevant reporting period; and
>
> iii) a list of the decisions made in the relevant reporting period, setting out, in respect of each decision in the list, the grounds of review relied on by the applicant, the grounds upheld, the grounds not upheld, and the final decision (along with any directions), and
>
> iv) any referrals made to the Australian Federal Police, by the inspector or assessors, about failures to comply with directions or decisions in the relevant reporting period; and
>
> v) the adequacy, or otherwise, of administrative staff supporting the inspector and the assessors in the relevant reporting period; and
>
> vi) whether concerns have been relayed to the Secretary of the Attorney-General's Department about administrative staffing arrangements, and, if so, the Secretary's response to those concerns in the relevant reporting period; and
>
> vii) whether concerns have been relayed to the Secretary of the Attorney-General's Department about arrangements governed by the Finance Law affecting the functions of the inspector, [142] and, if so, the Secretary's response to those concerns in the relevant reporting period; and
>
> viii) the general state of the Commonwealth Ombudsman's handling of complaints about whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth) in the relevant reporting period.

[261] Separately, on an annual basis, the Secretary of the Attorney-General's Department must table a report setting out, amongst other things:

> a) the annual expenditure on administrative staff supporting the work of the Office of the Inspector of the Public Interest Disclosure scheme; and
>
> b) the particularised annual expenditure on goods and services procured to advance the functions of the Office of the Inspector of the Public Interest Disclosure scheme.

[262] The Secretary's annual report should be prepared, to the extent practicable, in accordance with the requirements of the *Public Governance, Performance and Accountability Act 2013* (Cth) and, in particular, Division 3A of Part 2-3 of the *Public Governance, Performance and Accountability Rule 2014* (Cth).

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142 *Public Governance, Performance and Accountability Act 2013* (Cth), subordinate legislation (e.g. the *Public Governance, Performance and Accountability Rule 2014* (Cth)), and associated instruments (e.g. Commonwealth Procurement Rules) and policies.

VI-D. Establishing avenues for judicial review of decisions of the Commonwealth Ombudsman, and making judicial review more accessible for whistleblowers

VI-D1. Introduction

[263] While part VI-C of the submissions deal with, amongst other things, avenues of partial merits review being granted to whistleblowers from decisions of the Commonwealth Ombudsman and/or his officials, part VI-D deals with the issue of providing whistleblowers with access to the judiciary in respect of decisions made by the Commonwealth Ombudsman. It also deals with how applications for judicial review could be made less daunting, from a financial standpoint, for whistleblowers who make disclosures under the *Public Interest Disclosure Act 2013* (Cth).

VI-D2. Amending section 33 of the *Ombudsman Act 1976* (Cth)

[264] As it stands, subsection 33(1) of the *Ombudsman Act 1976* (Cth) provides that "neither the Ombudsman nor a person acting under under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done *in good faith* in exercise or purported exercise of any power or authority conferred by this Act ..."

[265] The *Ombudsman Act 1976* (Cth) ought to be amended so that while the Ombudsman or a member of his staff is not liable to criminal or civil proceedings for or in relation to an act or matter done, or omitted to be done, in good faith, a whistleblower shall have a right to apply to a court, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in relation to the Ombudsman's or his delegate's, decision in respect of complaints about inadequately investigated disclosures under the *Public Interest Disclosure Act 2013* (Cth).

[266] By way of example, the relevant provision might read something like this:

> 1) A person who is:
>
> > a) the Commonwealth Ombudsman; or
> >
> > b) the Deputy Commonwealth Ombudsman; or
> >
> > c) a person acting under the direction or authority of the Commonwealth Ombudsman or the Deputy Commonwealth Ombudsman,
>
> is not liable to any criminal or civil proceedings, or any disciplinary action (including any action that involves imposing any detriment), for or in relation to an act or matter done, or omitted to be done, in good faith:
>
> > d) in the performance, or purported performance, of any function conferred on the person by the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth); or
> >
> > e) in the exercise, or purported exercise, of any power conferred on the person by the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth).
>
> 2) This section does not apply to a breach of a designated publication restriction under the *Public Interest Disclosure Act 2013* (Cth).

3) This section does not affect any rights conferred by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to apply to a court, or any other rights to seek a review by a court or tribunal, in relation to

a) a decision; or

b) conduct engaged in for the purpose of making a decision; or

c) a failure to make a decision.

(4) An expression used in subsection (3) has the same meaning as in section 10 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

[267] This amendment would ensure that the right of a whistleblower to submit an application for judicial review of a decision, or conduct, or failures of the Ombudsman, or one of his officials, in respect of a complaint about an inadequately handled disclosure investigation under the *Public Interest Disclosure Act 2013* (Cth) broadly mirrors the right of whistleblowers to seek judicial review of decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth).

VI-D3. Filing applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

[268] The filing fees for applications for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) are set out in the *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth).

[269] Those regulations are made by the Governor-General on the advice of the Federal Executive Council.

[270] The Governor-General would be able to, on the advice of the Federal Executive Council, set the filing fee for an application under the ADJR Act in respect of:

a) decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth); or

b) decisions, or conduct, or failures of the Ombudsman or his officials exercising powers or functions, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in relation to complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth),

at whatever price the Federal Executive Council deems fit.

[271] I submit that the relevant filing fee should mirror the filing fee for applications under section 46PO or 46PP of the *Australian Human Rights Commission Act 1986* (Cth), which is set at $55 00 [143]

[272] That figure is paltry enough to be met by just about anybody in the country. Naturally, impecunious litigants will be able to avail themselves of the exemption provisions in the *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth) if they are unable to pay the $55 00 filing fee.[144]

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143 *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth), Schedule 1, items 102 and 202
144 *Federal Court and Federal Circuit and Family Court Regulations 2022* (Cth), Div 2 3

VI-D4. Shifting the costs burden

[273] In submissions made in response to the Attorney-General's Department's consultation paper, *Public sector whistleblowing reforms Stage 2 reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*, Mr Iain Anderson, the Commonwealth Ombudsman made the following submission:[145]

> The HRLC Report also identified legal costs as a significant deterrent to potential whistleblowers and impost on actual whistleblowers. While increased targeted funding (discussed further below) is one way to address that impact, another way to provide a similar effect is through legislative reform.
>
> A new presumption could be inserted into the PID Act to provide for legal costs to be covered by the Commonwealth unless there are exceptional circumstances A model for such an approach is set out in s 66 of the *Freedom of Information Act 1982* which provides a tribunal may exercise a discretion to recommend costs be paid by the Commonwealth in certain circumstances

[274] On principle, I support the Ombudsman's submission to shift the burden for legal costs to the Commonwealth where are whistleblower submits an application under the ADJR Act in respect of:

> a) decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth); or
>
> b) decisions, or conduct, or failures of the Ombudsman or his officials exercising powers or functions, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in relation to complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth).

[275] I submit that both the *Public Interest Disclosure Act 2013* (Cth) and the *Ombudsman Act 1976* (Cth) should be amended so that it is clear that, where the whistleblower applicant ***succeeds*** on the application, the starting point for the costs order that flows from an application for judicial review is that the whistleblower applicant is to be awarded costs on an ***indemnity*** basis, subject to respondent having a right to apply to the Court to request a diminution to the indemnity costs on account of the unreasonable conduct of proceedings by the applicant whistleblower (e g. the applicant spitefully or unnecessarily running up costs, the applicant's conduct causing unnecessary delay to the litigation etc.).

[276] I am more reluctant to offer submissions in respect of costs burdens where a whistleblower applicant ***does not succeed*** on an application under the ADJR Act in respect of:

> a) decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth); or
>
> b) decisions, or conduct, or failures of the Ombudsman or his officials exercising powers or functions, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in relation to complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth),

and, in the light of that reluctance, will not advance submissions on the matter.

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145 Iain Anderson, *Public sector whistleblowing reforms Stage 2 - reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*, January 2024, page 13, <https://consultations.ag.gov.au/integrity/pswr-stage2-consultation/view_respondent?uuid=923521142> (accessed on 30 June 2025).

VI-E. Establishing a joint parliamentary committee for whistleblower protections

VI-E1. Establishment and constitution of a joint parliamentary committee

VI-E1.1. Introduction

[277] I endorse the establishment of a joint parliamentary committee for whistleblower protections, although I submit that the committee should be slightly differently constituted to the proposed committee set out in part 6 of the Bill.

[278] I submit that the joint parliamentary committee should be constituted by twelve members, with six members from the House of Representative and six from the Senate.

VI-E1.2. Membership of the joint parliamentary committee from representatives in the House of Representatives

[279] Of the six members from the House of Representatives:

> a) subject to there being one,[146] one of the members of the joint parliamentary committee would be a representative from neither the Government nor the Opposition; and
>
> b) subject to there being two, two of the members of the joint parliamentary committee would be from the Opposition; and
>
> c) the remaining members of the joint parliamentary committee would be from the Government.

[280] If the House of Representatives is not constituted such that a representative is not from the Government or the Opposition, where the Opposition is able to field a third person, the Opposition shall be entitled to the membership reserved for the representative from neither the Government or the Opposition on the joint parliamentary committee, though the Opposition may choose to forfeit the place ordinarily reserved for the representative from neither the Government nor the Opposition to the Government if the leader of the Opposition in the House notified the Speaker of the House of Representatives, in writing, of the decision to forfeit

[290] If the House of Representatives is not constituted such that,

> a) the Opposition is able to field at least two representatives to participate as members of the joint parliamentary committee, and
>
> b) there are at least two representatives in the House of Representatives not from the Government or Opposition,

the representatives not from the Government or the Opposition shall, subject to forfeiting the benefit to the Government, be entitled to one of the two memberships ordinarily reserved for the Opposition on the joint parliamentary committee.

[300] In the unlikely event that there be neither Opposition, nor a representative not from the Government or the Opposition, in the House of Representatives, the Government shall be entitled to field six members from the House of Representatives to sit on the joint parliamentary committee

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146 It is possible and even plausible that the House of Representatives be constituted by only members of the Government and the official Opposition. The law should reflect that possibility

VI-E1.3. Membership of the joint parliamentary committee from the Senate

[301] Of the six members from the Senate

a) subject to there being two, two of the members of the joint parliamentary committee would be senators from neither the Government nor the Opposition; and

b) subject to there being two, two of the members of the joint parliamentary committee would be senators from the Opposition; and

c) the remaining senatorial members of the joint parliamentary committee would be from the Government

[302] Much like the House of Representatives' membership of the joint parliamentary committee, the legislation should be drafted to take account of contingencies in respect of the membership of senators, such as there being fewer than two senators from neither the Government nor the Opposition.

VI-E2. Hearings before the joint parliamentary committee are to be public unless conditions apply for *in camera* hearings

VI-E2.1. Default position on hearing before the joint parliamentary committee

[303] The legislation establishing a joint parliamentary committee for whistleblower protections should explicitly provide that hearing before the committee are to be public and open unless the committee determines that relevant statutory conditions are met for *in camera* hearings

VI-E2.2. *In camera* hearing of the joint parliamentary committee

[304] The legislation should explicitly provide that, where the statutory conditions are met for *in camera* hearings, those *in camera* hearings must be held within 10 days of the open hearing in which the conditions for the in camera hearings arose, subject, of course, to dissolution of:

a) the House of Representatives; or

b) the Senate; or

c) both the House of Representatives and the Senate,

within those ten days.

VI-E2.3. Grounds for *in camera* hearings of the joint parliamentary committee

[305] The legislation should provide that hearings shall only be held *in camera* to consider the substance of a public interest immunity claim advanced by a person during an open hearing.

[306] The legislation should also provide that, where the joint parliamentary committee determines, by a majority upon a vote, that the public interest immunity claim is not made out, the basis of the claim and the entire transaction between the witness who advanced the immunity claim and the committee must be published in Hansard.

[307] Moreover, the legislation should provide that:

a) any documents presented to the joint parliamentary committee; and

b) are the subject of a failed public interest immunity claim,

must be tabled as though the relevant documents were part of the transaction of the open hearing.

[308] The legislation should provide that, in the event of a tied vote, the public interest immunity claim shall be taken as defeated.

VI-E3. Those appearing before the joint parliamentary committee may not withhold information from the committee

[309] The legislation establishing a joint parliamentary committee for whistleblower protections should explicitly provide that, other legislative provisions notwithstanding, those appearing before the the joint parliamentary committee may not withhold information from the committee upon a request for information from any members of the committee. Consequential amendments to certain items of legislation (e g. subsection 35(8) of the *Ombudsman Act 1976* (Cth)) are desirable and, thus, should be effected by the Parliament.[147]

[310] The legislation should contain an explicit provision giving a person appearing before the joint parliamentary committee the right to object to responding to a request for information ***only*** on the ground that the request for information is not relevant to the committee's functions or purposes.

[311] The legislation should explicitly provide that, where an objection has been raised on the ground that the request for information is not relevant to the committee's functions or purposes.

a) the joint parliamentary committee will, by majority vote, determine whether the relevant request for information is relevant to the committee's functions and purposes; and

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147 During the hearings of the Royal Commission into the Robodebt Scheme, the Commonwealth Ombudsman submitted to the Royal Commissioner that neither he nor his officials, past or present, could be compelled to disclose any information acquired in the course of activities conducted under, or for the purposes of, the *Ombudsman Act 1976* (Cth) or under Part V, Division 7 of the *Australian Federal Police Act 1979* (Cth). Report of the Royal Commission into the Robodebt Scheme, p 573, <https://robodebt.royalcommission.gov.au/publications/report>.

The basis of the Commonwealth Ombudsman assertion was subsection 35(8) of the *Ombudsman Act 1976* (Cth), which provides:

> A person who is or has been an officer is not compellable, in any proceedings before a court (whether exercising federal jurisdiction or not) or before a person authorized by a law of the Commonwealth or of a State or Territory, or by consent of parties, to hear, receive and examine evidence, to disclose any information acquired by him or her by reason of his or her being or having been an officer, being information that was disclosed or obtained under the provisions of this Act or under Division 7 of Part V of the *Australian Federal Police Act 1979*.

Royal Commissioner Holmes "did not entirely accept this view but agreed to proceed on the basis that the Ombudsman would assist the Commission voluntarily". Report of the Royal Commission into the Robodebt Scheme, p 573

In the event that the Parliament were to forbid those appearing before the the joint parliamentary committee to withhold information from the committee upon a request for information from any members of the committee, I would encourage the Parliament to also amend the *Ombudsman Act 1976* (Cth) to explicitly provide that subsection 35(8) of the *Ombudsman Act 1976* has no application to hearings before the joint parliamentary committee for whistleblower protections.

There should, in my opinion, be no opportunity provided to any public official to undermine the purposes or functions of joint parliamentary committee by refusing to respond to the committee's, or a member's, request for information.

b) in the event of a tied vote, the objection raised on the ground that the request for information is not relevant to the committee's functions or purposes shall be taken as defeated.

VI-E4. Those appearing before the joint parliamentary committee must use their best endeavours to respond to requests for information

[312] Moreover, the relevant legislation should provide that those appearing before the committee must use their best endeavours to:

a) assist the joint parliamentary committee with its agenda; and

b) answer requests for information directly, or, where unable to provide direct answers, to provide as much relevant information on the matter under consideration

VI-E5. General functions of the joint parliamentary committee

[313] While I endorse the establishment of a joint parliamentary committee for whistleblower protections, the committee would have broader functions than that set out in part 6 of the Bill.

[314] Specifically, I envisage that the functions of the committee would extend to, amongst other things:

a) considering, and endorsing or rejecting, recommendations for the appointment of the inspector of the Office of the Inspector of the Public Interest Disclosure Scheme; and

b) considering, and endorsing or rejecting, recommendations for the appointments of assessors of the Office of the Inspector of the Public Interest Disclosure Scheme, and

c) receiving biannual reports from the inspector; and

d) receiving biannual reports from the Commonwealth Ombudsman on, amongst other things

i) the matters that the Commonwealth Ombudsman is obligated to report about under paragraphs 76(2)(a), (c) and (d) of the *Public Interest Disclosure Act 2013* (Cth) in the relevant reporting period; and

ii) for the relevant reporting period, a list of the inspector's decisions that have not been complied with (i.e. either the substance of the decision was not complied with or, more specifically the directions were not complied with), and the reasons for non-compliance (e.g. a stay has been granted by a court of competent jurisdiction while the substance of the decision or directions is reviewed); and

iii) for the relevant reporting period, a summary, which includes a broad description of each of the grounds of complaint, of each complaint made to the Commonwealth Ombudsman about the conduct of agencies in relation to public interest disclosures; and

iv) for the relevant reporting period, a notation about the outcome or, if the matter is pending an outcome, the pending state of an outcome in respect of each complaint made to the Commonwealth Ombudsman about the conduct of agencies in relation to public interest disclosures; and

v) the adequacy, or otherwise, of administrative staff supporting the inspector and the assessors in the relevant reporting period; and

vi) whether concerns have been relayed to the Secretary of the Attorney-General's Department about administrative staffing arrangements, and, if so, the Secretary's response to those concerns in the relevant reporting period; and

vii) whether concerns have been relayed to the Secretary of the Attorney-General's Department about arrangements governed by the Finance Law affecting the functions of the inspector, [148] and, if so, the Secretary's response to those concerns in the relevant reporting period; and

viii) the general state of the Commonwealth Ombudsman's handling of complaints about whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth) in the relevant reporting period; and

e) conducting a minimum of two hearings annually (outside of hearings conducted to consider recommendations for appointments), where, amongst others:

i) the inspector of the Office of the Inspector of the Public Interest Disclosure Scheme; and

ii) the Secretary of the Attorney-General's Department; and

iii) the Commissioner of the Australian Federal Police; and

iv) the lead officer or officers in the Australian Federal Police responsible for investigating offences arising from whistleblower disclosures, and

v) the Commonwealth Director of Public Prosecutions; and

vi) the lead prosecutor or prosecutors with appropriate responsibilities for whistleblower protection prosecutions; and

vii) the Commonwealth Ombudsman,

will be present to answer questions about the state of the Commonwealth's whistleblower disclosure scheme; and

f) receiving annual reports from the Commissioner of the Australian Federal Police on, amongst other things, investigations arising from acts of whistleblower reprisal, referrals about the failure of the Commonwealth Ombudsman or his officials complying with decisions or directions of the inspector, police education events pertaining to offences arising from whistleblower disclosures, and other matters set out in legislation; and

g) receiving annual reports from the Commonwealth Director of Public Prosecutions on, amongst other things, prosecutions arising from acts of whistleblower reprisal, referrals about the failure of the Commonwealth Ombudsman or his officials complying with decisions or directions of the inspector, prosecutorial education events pertaining to offences arising from whistleblower disclosures, and other matters set out in legislation.

[315] This list of functions is, of course, illustrative and non-exhaustive.

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148 *Public Governance, Performance and Accountability Act 2013* (Cth), subordinate legislation (e.g. the *Public Governance, Performance and Accountability Rule 2014* (Cth)), and associated instruments (e.g. Commonwealth Procurement Rules) and policies.

VI-F. The functions of an effective whistleblower system – information about the whistleblower system, investigations and prosecutions of criminal conduct relating to whistleblowers, and support structures for whistleblowers

VI-F1. Introduction

[316] While I do not believe that the Bill should be passed in its current state, I think that there are themes and ideas that may be usefully adapted and adopted.

[317] There are four major themes apparent to me in the Bill, though they are presented in the Bill in a something of a melange (i.e the themes have not been presented in an analytically rigorous manner). The themes apparent to me are:

a) information about the Commonwealth's whistleblower system; and

b) investigations of criminal conduct relating to whistleblower disclosures, and

c) prosecutions of criminal conduct relating to whistleblower disclosures; and

d) support structures for whistleblowers.

[318] These four themes require further analysis but it suffices to note, at the moment, that these themes will guide the substance of these submissions.[149]

[319] Moreover, there is, in my opinion, a need to elaborate how the functions associated with these themes are to effected.

[320] I have set out my reservations about the concentration of functions in the WPA in these submissions. I think such concentration undesirable.

[321] I also think that the some of the functions in the proposed WPA are unnecessary and wasteful because there are already institutions, with established procedures and apparatuses, that could, with some additional funding and support, adequately perform the enforcement functions that the drafters of the Bill would have had the WPA perform.[150]

[322] While some of the functions associated with these themes may be, with appropriate support, be effected by established institutions, some of the functions associated with these themes are not properly effected by any institutions and, for that reason, I will draw attention to options for establishing such institutions.

VI-F2. Information about the Commonwealth's whistleblower system

VI-F2.1. Introduction

149 At a more fundamental level, my willingness to have these themes guide my submissions presupposes that I am, on some level, committed to the correctness of the drafters' assumptions that these four themes form the crux of appropriate legislative intervention to bring about a more effective whistleblower regime for the Commonwealth public sector (recall that these submissions are limited to the whistleblower scheme under the *Public Interest Disclosure Act 2013* (Cth), and do not address other whistleblower schemes, such as the scheme under Part 9.4AAA of the *Corporations Act 2001* (Cth)).

150 Two such institutions are the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

With appropriate support, these institutions should, in my opinion, be well placed to investigate and prosecute criminal conducting arising from whistleblower disclosures being made (whether the conduct relates to reprisal action, breaches of a designated public restrictions under the *Public Interest Disclosure Act 2013* (Cth), failures of the Commonwealth Ombudsman or his officials to comply with decision or directions of the inspector etc).

[323] There is a justifiable perception,[151] on the part of the drafters of the Bill, that the Commonwealth's whistleblower scheme is not working as it ought to,[152] and the Bill has been presented as a remedy these failures.

[324] I noted, at the beginning of these submissions, that the Senate's Legal and Constitutional Affairs Committee had been, in effect, tasked with assessing a Bill about how whistleblowers and their disclosures are dealt with without having access to a comprehensive and objective base of evidence of the way in which whistleblowers and their disclosures are actually dealt with by federal agencies and corporations, and how that state of affairs had handicapped the Senate's Legal and Constitutional Affairs Committee.

[325] Plainly, adequate information about how the Commonwealth's whistleblower scheme is actually operating is not available.

[326] But data about the actual operation of the Commonwealth's whistleblower scheme is not the only type of information that is lacking. There is also a dearth of information about proper process and procedure pertain to the institutional functions of those supporting or protecting whistleblowers.[153]

[327] For the sake of simplicity, these two types of information will, in these submissions, be referred to as *case data* and *normative data*.

VI-F2.2. Institutions

VI-F2.2.1. Introduction

[328] Unlike institutions for the investigation or prosecution of criminal conduct relating to whistleblower disclosures,[154] there are no *statutory* institutions that exist for the collection of case data or the dissemination of normative data.

[329] Before making submissions about the instituting a statutory body, it is important to grapple with some antecedent questions.

> a) Is a statutory body the only institutional mechanism by which the purposes associated with the collection of case data, and the dissemination of normative data, is possible (or, to put it another way, are there institutional modes, other than institutions created pursuant to statute, that may effectively undertake the functions, and effect the purposes, associated with the collection case data, or the dissemination normative data, for the advancement of the Commonwealth whistleblower scheme)?
>
> b) Is the institution of a statutory body the the most desirable mechanism by which the purposes associated with the collection of case data, and the dissemination of normative data, can be effected?
>
> c) What are the purposes associated with the collection of case data, and the dissemination of normative data, for the advancement of the Commonwealth whistleblower scheme?

151 While the evidence presented with these submissions is, admittedly, a small sample, on the basis of that evidence, it is fair to say that the current oversight system in relation to the *Public Interest Disclosure Act 2013* (Cth), which is vested in the Office of the Commonwealth Ombudsman, is failing.

152 Again, I note that the submissions are limited to the whistleblower scheme under the *Public Interest Disclosure Act 2013* (Cth). These submissions do not address other whistleblower schemes, such as the scheme under Part 9.4AAA of the *Corporations Act 2001* (Cth).

153 It will soon become apparent that some institutions required for the adequate execution of functions do not yet exist.

154 For example, the Australian Federal Police and the Commonwealth Department of Public Prosecutions.

[330] These questions are, aside from being analytically anterior questions worth considering before jumping head first into submissions about the establishment of a statutory body for the collecting and disseminating information for the advancement of the Commonwealth's whistleblower scheme, of strategic importance [155]

VI-F2.2.2. Purposes associated with the collection of case data

[331] Collecting case data is important because it provides an insight into *actual* states of affairs.

[332] Case data may be *in respect of* certain *subjects*.

[333] Some subjects may be of little relevance to how the Commonwealth's whistleblower regime is operating. Some subjects are of cardinal relevance to how the Commonwealth's whistleblower regime is operating.

[334] An example of a subject of cardinal relevance is that of how the agency with oversight of the *Public Interest Disclosure Act 2013* (Cth), the Office of the Commonwealth Ombudsman, is handling complaints arising from inadequacies in the public interest disclosure investigation process.

[335] As things stand, this information is virtually inaccessible.

[336] I have, in these submissions, identified some means by which data about the how the Office of the Commonwealth Ombudsman is handling complaints can be made accessible in a responsible manner

[337] I have:

> a) suggested that avenues of judicial review of the acts or omissions of the Commonwealth Ombudsman be introduced to whistleblowers under the ADJR Act so that legal errors see the light of day; and
>
> b) suggested that avenues of partial merits review of decisions of the Commonwealth Ombudsman by an inspector be introduced, with the reasons for review being published, so that issues relating to the merits of the Ombudsman's handling of complaints associated with reviewable inadequacies see the light of day; and
>
> c) suggested that a parliamentary body, with ample powers and appropriate checks, be set up to oversee how bodies dealing with whistleblower issues, such as the Office of the Commonwealth Ombudsman, are actually handling those issues pursuant to their statutory remits.

[338] Obviously, information about how the Office of the Commonwealth Ombudsman handles complaints does not exhaust the subjects of relevance to how the Commonwealth's whistleblower regime is operating.[156]

[339] That said, having such information would provide researchers with data to inform the parameters and direction for further research

[340] Similarly, having such information would provide parliamentarians with useful cues upon which to base sensible questions about the needs of agencies dealing with whistleblowers, or with data to advance recommendations for potential legislative intervention.

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155 The strategic importance of drawing attention to these analytically anterior questions will soon become apparent

156 Other examples of subjects of relevance are how investigations and prosecutions of criminal conduct relating to whistleblower disclosures are actually being handled. I have, in these submissions, suggested that a joint parliamentary committee be established to elicit this information.

[341] Having such information would also provide those preparing *normative data*, such as educational materials, with an understanding of matters of educational priority.

[342] So, what are the purposes associated with the collection of case data?[157]

[343] Recalling that case data is *in respect of subjects*, [158] first, collecting case data provides researchers on the subject or subjects under consideration with data to inform the parameters and direction for research.

[344] Second, case data would provide parliamentarians with useful cues upon which to base sensible questions about the needs of agencies dealing with whistleblowers.

[345] Third, case data would provide parliamentarians with an evidentiary basis upon which to formulate and, then, advance recommendations for potential legislative intervention

[346] Fourth, case data would also provide those preparing *normative data*, such as educational materials, with an understanding of matters of educational priority. This is useful because the scarce resources of those preparing normative data will be targeted towards those areas of work requiring actual support, remedial or otherwise.

[347] Of course, one must be able to access the raw data, and that is why the reforms and statutory interventions set out in parts VI-C, VI-D and VI-E of these submissions are both appropriate and practically necessary

VI-F2 2 3 Purposes associated with the dissemination of normative data

[348] As with case data, *normative data* may be *in respect of* certain *subjects*.

[349] Normative data is data that is aimed at illuminating norms of conduct, and in the context of the Commonwealth's whistleblower regime, normative data will be aimed at illuminating *norms of conduct* in respect of the Commonwealth's whistleblower regime

[350] Normative data in respect of the Commonwealth's whistleblower regime will illuminate how the *functions* of relevant institutions may best be carried out, and how the *purposes* of relevant institutions may best be effected

VI-F2 2 4 Is it appropriate to have a dedicated body to collect case data or disseminate normative data?

[351] Without access to fundamental data, which, being in the sole control of the Executive, can only effectively, directly or indirectly, be elicited according to law, any attempts to grapple with issues relating to the Commonwealth's whistleblower regime will be poorly informed

[352] The reforms and statutory interventions set out in parts VI-C, VI-D and VI-E are, in part, aimed opening up the potential treasury of data needed by legislators to meaningfully grapple with *fundamental* questions about the Commonwealth's whistleblower regime.

[353] But beyond fundamental questions, which are limited to the operations of the Executive (on account of the fact that parliamentary committees, inspectors and the judiciary assess, within the proper spheres of competence, operations of the Commonwealth Executive), legislators will, upon reflection, realise that they are:

157 Obviously, given the question, I am committed to the proposition that there is more than one purpose to collecting case data.

158 Again, and obviously, I am committed to the proposition that case data may be in respect of more than one subject

a) lacking a great deal of case data; and

b) not best placed to disseminate normative data.

[354] As noted, fundamental case data is limited in its scope to the operations of the Executive on account of the fact that parliamentary committees, inspectors and the judiciary assess, within the proper spheres of competence, actions of the Commonwealth Executive. But, without diminishing the importance of case data on the operations of the Executive, case data in respect of whistleblowers and the Commonwealth's whistleblower regime extends to much more than case data about the operations of the Commonwealth Executive.

[355] For example, case data about social supports, such a legal aid, or the effectiveness of the provision of mental health services, for whistleblowers, will be of importance to legislators to determine whether further refinements to the Commonwealth's whistleblower regime are viable or desirable or practically necessary in the light of societal norms.

[356] Much of what has been developed in these submissions about information on the Commonwealth's whistleblower system has, I hope, led the reader to the realisation that there is an institutional lacuna – namely in respect of an institution or a set of institutions devoted to:

a) the collection, assessment and analysis of case data in respect of

i) the investigation of criminal conduct relating to whistleblower disclosures; and

ii) the prosecution of criminal conduct relating to whistleblower disclosures; and

iii) social support structures for whistleblowers, be they private or public; and

iv) the effectiveness of the matters set out in (i) – (iii) above; and

b) the dissemination of normative data in respect of

i) the investigation of criminal conduct relating to whistleblower disclosures, and

ii) the prosecution of criminal conduct relating to whistleblower disclosures; and

iii) social support structures for whistleblowers, be they private or public.

[357] Having an institution devoted to:

a) the collection, assessment and analysis of case data; and

b) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system appears to me and, for that matter, the drafters of the Bill to be a practical necessity.[159]

159 Please refer to Bill, Part 5, and ss 4(c), 12(1)(c), and 20 as support for the proposition that the drafters of the Bill believe having an institution devoted to collecting case data and disseminating normative data is a practical necessity

V1-F2 2 5 Is a statutory body necessary to collect case data or disseminate normative data?

[358] Having reflected on the nature of case data and normative data in respect of the Commonwealth's integrity system, and the practical necessity of having an institution or set of institutions devoted to a) the collection, assessment and analysis of case data, and b) the dissemination of normative data, it is now appropriate to ask whether such a body must be a statutory body.

[359] To put it another way, are there institutional modes, other than institutions created pursuant to statute, that may effectively undertake the functions, and effect the purposes, associated with the collection case data, or the dissemination normative data, for the advancement of the Commonwealth whistleblower scheme?

[360] I have already noted that, at a fundamental level, statutory bodies are required to open up access to case data, but opening up access to case data is analytically distinct to the posterior task of collecting, assessing and analysing data that has been made available.

[361] A moment's reflection is enough to notice that it is not *necessary* to have a statutory body to either:

a) collect, assess or analyse case data; or

b) disseminate normative data

for the purposes of the Commonwealth's integrity system.

[362] Of course, that is not to say that a statutory body should not be set up. The point is merely that if a statutory body were not to be set up, it would still be possible to a) collect, assess or analyse case data; or b) disseminate normative data for the purposes of the Commonwealth's integrity system.

[363] Indeed, such a state of affairs exists in respect of the collection of case data and dissemination of normative data for the purposes of judicial administration in Australia.

[364] The Australasian Institute of Judicial Administration (formerly the Australian Institute of Judicial Administration) has, since the 1970s, collected, assessed and analysed data on many subjects pertaining to judicial administration, and has, in the light of the analysis and assessment of data, made recommendations for reform, or change, or the preservation of existing systems.[160] The AIJA has also produced many high quality normative publications pertaining to judicial administration in Australia. [6]

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160 The high quality publications are too many to name, but a few examples will suffice to illustrate the breadth of subjects pertaining to judicial administration that the AIJA has considered as part of its work

a) Jones C and Guthrie J, *Efficacy, accessibility and adequacy of prison rehabilitation programs for Indigenous offenders across Australia* (2016) AIJA;

b) Hale S, *Interpreter policies, practices and protocols in Australian Courts and Tribunals – a national survey* (2011) AIJA

c) Cranston R, Haynes P, Pullen J, Scott IR, *Delays and efficiency in civil litigation* (1985) AIJA

161 Again, the publications are too many to name, but a few examples suffice to illustrate the breadth of subjects pertaining to judicial administration that the AIJA has considered as part of its work:

a) *Guide to judicial conduct* (2nd ed) (2007) AIJA.

b) Perry MA, *Disqualification of judges: practice and procedure* (2001) AIJA.

c) Olsson LT, *Guide to uniform production of judgments* (2nd ed) (1999) AIJA.

[365] The Australasian Institute of Judicial Administration is not a statutory body, it is a civic organisation and registered charity under Australian law It is funded by both private contributions and taxpayer contributions (with public funding from the Commonwealth, and the States and Territories, as well as the Government of New Zealand).

[366] The point of drawing attention to the work of the Australasian Institute of Judicial Administration, and the organisation, is to demonstrate that it is not necessary to set up a statutory body to establish an institution devoted to:

a) the collection, assessment and analysis of case data; and

b) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system.

[367] The strategic importance of this observation will soon become apparent.

V1-F2 2 6. The nature of a body established to collect case data or disseminate normative data

[368] Whether or not the institution, or set of institutions, established to:

a) collect, assess or analyse case data; or

b) disseminate normative data

for the purposes of the Commonwealth's integrity system is a statutory body or a civic organisation (e.g. an association under the general law, an association incorporated under statute, a corporation etc.) is, in my opinion, neither here nor there.[162]

[369] Of greater importance is the function or functions of such a body

[370] So far as I am concerned, the primary function of an institution devoted to a) the collection, assessment and analysis of case data, and b) the dissemination of normative data for the purposes of the Commonwealth's integrity system should be to administer grants to experts and academics.

[371] Therefore, such an institution should have, amongst its chief officials, those who understand research economics and who are able to, in the light of methodological best practice, identify well formulated research proposals to direct scarce funds to.

[372] Of course, having a board of directors or overseers constituted by jurists, police investigators, medical experts and those with lived experience as whistleblowers, amongst others, would be welcome because such people bring expertise and stakeholder experience relevant to the purposes of the Commonwealth's integrity system.

V1-F2 2 7 The strategic importance of the observation that a statutory body is not necessary to collect case data or disseminate normative data

[373] I am unconvinced that provisions that are, at least obliquely, directed to the collection of case data and the dissemination of normative data have been articulated in an effective manner in the Bill. [163]

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162 Each mode as advantages and disadvantages, although it is worth pointing out that, in the case of statutory bodies, it is possible for a Government to effectively, if not formally, abolish it (much like the Abbott Government's regrettable decision to completely defund the Administrative Review Council)

163 e g. Bill, Part 5, and ss 4(c), 12(1)(e), and 20.

[374] I am also unconvinced that the Bill will be enacted in its current form, and, for reasons outlined in these submissions, think it would be a poor decision to enact the Bill in its current form

[375] Of course, if the Bill is not enacted, that is not the end for whistleblowers or for those legislators who are invested in bringing about positive changes to the Commonwealth's incomplete whistleblower system.

[376] The biggest challenge facing those who wish to bring about positive changes to the Commonwealth's incomplete whistleblower system is funding, but that is not an insurmountable challenge.

[377] Anybody, including but not limited to Senators Pocock and Lambie, could establish a *go fund me* page to raise money [164] Naturally, a well articulated set of priorities would have to be communicated to those from whom donations would be solicited

[378] As I see it, the first stage would involve raising funds to get professional advice from:

a) those experienced in the administration of research funding; and

b) legal practitioners,

on establishing a body to administer research grants for:

c) the collection, assessment and analysis of case data; and

d) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system.

[379] The second stage would involve raising funds from donors to.

a) fund the administration of the body; and

b) engage in substantive activities.

[380] From a strategic standpoint, it seems to me that the research priorities of the body should be:

a) to prepare guidelines and materials setting out best practice for police investigations relating to offences arising from whistleblower disclosures; and

b) to prepare guidelines and materials setting out best practice for prosecutions relating to offences arising from whistleblower disclosures.

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164 That is not all that could be done Senators Pocock and Lambie are elected leaders, and have a both a mandate for advancing positive changes to the Commonwealth's incomplete whistleblower system and unique platform for such an undertaking Senators Pocock and Lambie, and all parliamentarians, would be able to reach out to members of their communities for help with the undertaking of advancing positive changes to the Commonwealth's incomplete whistleblower system So long as the senators are able to provide effective leadership and direction, I imagine there would be more than a few people in their communities with expertise in, for example

a) the law of charities; or

b) grants administration,

who might be willing to come forward and assist the senators with endeavours that seem to resonate well with many Australians.

[381] I note this because, in preparing such materials, those preparing the materials may, as part of best practice, seek the input of those for whom the materials are being prepared and, in the process, likely form positive relationships with those for whom the materials are being prepared.

[382] It's one thing for the Government to ignore comments about changes to the Commonwealth's integrity system from independent senators or the electors they represent. It's quite another thing to ignore stakeholders like the Commissioner of the Australian Federal Police, the Commonwealth Director of Public Prosecutions or the Australian Federal Police Association, particularly when these stakeholders have positive things to say about the work of those preparing materials for their organisations to help those organisations to best deal with offences arising from whistleblower disclosures.

[383] With high quality outcomes from research grants, it will be far more difficult for a Government to ignore the issue of whistleblower protections.[165] Indeed, with the substantive work being taken care of successfully by a civic organisation, throwing money at the organisation would be an easy win for the Government because it would be able to announce that it is funding research into

a) the collection, assessment and analysis of case data; and

b) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system, and that the delivery of the funding is proof that the Government is serious about its anti-corruption and public interest disclosure agendas.

[384] With the defeat of the Bill, short of effecting the more modest reforms set out in parts VI-C, VI-D and VI-E of these submissions, the establishment of a civic organisation devoted to the funding research into:

a) the collection, assessment and analysis of case data; and

b) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system may well be the most effective vehicle for securing long-term positive changes for whistleblowers and for the Commonwealth's whistleblower regime.

VI-F2.2.8. Providing data for root and branch reforms

[385] With a coherent body of research grounded in good methodology and practice, the Government of the day will be better placed to develop proposals for root and branch reforms to the Commonwealth's whistleblower regime, and parliamentarians will be better placed to consider proposals put forward by the Government.

VI-F3. Investigations of criminal conduct relating to whistleblower disclosures

VI-F3.1. Introduction

[386] I have set out my reservations about the concentration of functions in the WPA in these submissions. I think such concentration undesirable.

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165 According to Senator Pocock's second reading speech, the concept of whistleblower protections, in the form of an authority, was raised more than three decades ago by a select committee of the Senate. Second Reading Speech, Whistleblower Protection Authority Bill 2025 (No 2), 11 February 2025, *Hansard*, page 472

[387] In the context of the investigation of criminal conduct relating to whistleblower disclosures, such as acts of reprisal, I think that some of the functions in the proposed WPA are unnecessary and wasteful because there is an institution, with established procedures and apparatuses, that could, with some additional funding and support, adequately perform the enforcement functions that the drafters of the Bill would have had the WPA perform — namely, the Australian Federal Police.

VI-F3.2. Support to the AFP

[388] I have, in part VI-F2, pointed out that I do not believe that the Bill will be enacted in its current form. I have also, in these submissions, articulated reasons against the enactment of the Bill in its current form.

[389] Moreover, I have set out my views about the establishment of a body, be it statutory or non-statutory, devoted to funding research into:

a) the collection, assessment and analysis of case data; and

b) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system.

[390] In my opinion, irrespective of funding from the Government, I think, as a matter of priority, a grant should be provided for the development of guidelines and materials setting out best practice for police investigations relating to offences arising from whistleblower disclosures.[166]

[391] Preparing such documents would, aside from being of practical assistance to those tasked, under existing laws, with investigating criminal conduct arising from whistleblower disclosures, likely provide the leadership of the Australian Federal Police, and the Government, with an understanding of what is required to effectively investigate offences arising from whistleblower disclosures and, thus, an objective set of parameters against which police resourcing can be assessed.

VI-F4. Prosecution of criminal conduct relating to whistleblower disclosures

VI-F4.1. Introduction

[392] I have set out my reservations about the concentration of functions in the WPA in these submissions. I think such concentration undesirable.

[393] In the context of the prosecution of criminal conduct relating to whistleblower disclosures, such as acts of reprisal, I think that some of the functions in the proposed WPA are unnecessary and wasteful because there is an institution, with established procedures and apparatuses, that could, with some additional funding and support, adequately perform the enforcement functions that the drafters of the Bill would have had the WPA perform — namely, the Commonwealth Director of Public Prosecutions.

VI-F4.2. Support to the CDPP

[394] I have, in part VI-F2, pointed out that I do not believe that the Bill will be enacted in its current form. I have also, in these submissions, articulated reasons against the enactment of the Bill in its current form.

166 Examples of normative materials include materials on appropriate interactions with whistleblowers in the course of investigations, preparing briefs for prosecutors in the context of existing whistleblower legislation (e.g. the *Public Interest Disclosure Act 2013* (Cth)) etc

[395] Moreover, I have set out my views about the establishment of a body, be it statutory or non-statutory, devoted to funding research into

a) the collection, assessment and analysis of case data; and

b) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system.

[396] In my opinion, irrespective of funding from the Government, I think, as a matter of priority, a grant should be provided for the development of guidelines and materials setting out best practice for prosecuting offences arising from whistleblower disclosures.[167]

[397] Preparing such documents would, aside from being of practical assistance to those tasked, under existing laws, with prosecuting criminal conduct arising from whistleblower disclosures, likely provide the leadership of the Commonwealth Director of Public Prosecutions, and the Government, with an understanding of what is required to effectively prosecute offences arising from whistleblower disclosures and, thus, an objective set of parameters against which prosecutorial resourcing can be assessed.

V1-F5. Support structures for whistleblowers

[398] Potential structures for the support of whistleblowers are manifold, and subjects of research, and research funding, in respect of these structures all the more numerous.

[399] It would not be appropriate to provide substantial submissions on the so broad a topic, not least because these already lengthy submissions would more than double.

[400] I think it suffices to point out that there are many kinds of support that could potentially be offered to whistleblowers, and these kinds of support include, but are not limited to,

a) legal supports from community legal centres, private firms and publicly funded legal aid services; and

b) mental health and clinical practices; and

c) community social support and welfare organisations.

[401] I imagine many of these organisations would benefit considerably from case data and normative data in respect of their work,[168] and the existence of a body that provides grants for the:

a) the collection, assessment and analysis of case data; and

b) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system would, it seems to me, give such organisations the tools to better support whistleblowers.

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167 Examples of normative materials include materials on appropriate interactions with whistleblowers in the course of investigations, preparing briefs for prosecutors in the context of existing whistleblower legislation (e.g. the *Public Interest Disclosure Act 2013* (Cth)) etc.

168 The normative materials need not necessarily be in respect of the spheres of operation traditionally associated with the work of these support providers. For example, I think that providers of mental health support, particularly smaller practices, would be greatly assisted by normative materials about peculiar legal obligations arising from the disclosure of information from a whistleblower in the course of, for example, a mental therapy session.

VI-F6. Funding for community legal centres

[402] Much has been written about providing funding to community legal centres and other pro bono legal service providers to assist with litigation involving whistleblowers. I need not spill further ink on the matter.

VI-G. Effecting position changes through committee hearings

[403] In these submissions, much has been noted about legislative interventions to effect positive changes for whistleblowers. I have also noted how, with non-legislative interventions, positive changes can be secured for whistleblowers and the Commonwealth's whistleblower regime.

[404] Unlike most non-legislative interventions, there is at least one kind of non-legislative intervention that is uniquely available to senators – asking questions of the Executive during committee hearings.

[405] I note that the *Public Interest Disclosure Act 2013* (Cth) was amended in 2023,[169] with the relevant amendments coming into effect on 1 July 2023.[170]

[406] If a prospective whistleblower searches the Commonwealth Ombudsman's website for resources relating to making a public interest disclosure, that person will find that each of the resources listed below is subject to the following notes – "information will be published when available" and "please note that the content of this section is under construction following recent amendments to the PID Act".[171]

a) Guide to making a disclosure under the *Public Interest Disclosure Act 2013*; and

b) PID - About the *Public Interest Disclosure Act 2013*; and

c) PID - How to make a public interest disclosure; and

d) PID - Managing the risk of reprisal

e) PID – Frequently asked questions

[407] This is despite the Commonwealth Ombudsman noting, in the Public Interest Disclosure Scheme 2023-2024 Annual Report, that his "view is that, 11 years after it was first enacted, the PID Act is still not well understood in the Commonwealth public sector."[172]

[408] For somebody who claims that "that, 11 years after it was first enacted, the PID Act is still not well understood in the Commonwealth public sector", it seems that the Commonwealth Ombudsman is

169 *Public Interest Disclosure Amendment (Review) Act 2023* (Cth).
170 *Public Interest Disclosure Amendment (Review) Act 2023* (Cth), s 2.
171 https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing/tools-and-resources . Accessed on 30 June 2025
172 Public Interest Disclosure Scheme 2023-2024 Annual Report, pages 8 – 9 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/306085/Public-Interest-Disclosure-Scheme-Annual-Report-2023-24.pdf >.

One would think that, if the Commonwealth Ombudsman is concerned about the fact that the *Public Interest Disclosure Act 2013* (Cth) is not well understood in the public sector, the Ombudsman might do something about that, such as publishing the missing resources about the PID Act on the Ombudsman's website.

I do wonder if Mr Anderson's comments about the PID Act not being well understood was also aimed at some of his own officials. The case study referred to in part III C3 of these submissions should give the reader of these submissions cause to believe that Mr Anderson's comments apply in respect of his own staff members.

not all that invested in helping whistleblowers or members of the public sector better understand the whistleblower regime that he has oversight of.

[409] In the last two years neither Senator Lambie nor Senator Pocock (nor, for that matter, any senator) has bothered to ask the Commonwealth Ombudsman, either orally at Senate Estimates, or via a question on notice, why the Commonwealth Ombudsman has not bothered to publish basic resources in respect of the *Public Interest Disclosure Act 2013* (Cth) on his website.

[410] As I drafted these submissions on the Bill, I recalled P J O'Rourke's quip - *everybody wants to save the Earth; nobody wants to help mum do the dishes.*

[411] With respect, whistleblowers are not in need of well meaning champions who are primed to tilt at windmills. Poorly drafted and grandiloquent bills are not what whistleblowers need.

[412] Whistleblowers are in need of competent allies, such as well trained police, prosecutors, lawyers and, more to the point, senators who will get on with the prosaic work. In the case of senators, that prosaic work extends to, amongst other things, familiarising themselves with the law and the Ombudsman's published materials (e.g. policy documents, guidelines etc.), and, in the light of the law and those materials, asking pertinent questions at Senate Estimates.

[413] I have not noted this to denigrate Senators Lambie or Pocock (or other senators), but I do note it critically. I think that most senators have failed to avail themselves of opportunities to do that which is within their power to make things a little easier for whistleblowers. I hope that these critical comments spur those interested in bringing about positive changes in the Commonwealth's whistleblower regime into action (i.e. reading those seemingly boring policy documents, and guidelines, and statute books, and annual reports to get a better handle on the subject of the Commonwealth's whistleblower regime, and, in that light, ask the Commonwealth Ombudsman, amongst others, pertinent questions about the state of that regime during committee meetings).

PART VII – CONCLUSION

[414] The essential point made in these conclusions is that the Bill is not, in its current form, fit to be enacted.

[415] I have focussed on a few issues in these submissions that I believe to be of particular concern.

[416] Broadly speaking, three key issues about the Bill were addressed in parts II, III and IV of these submissions, with those issued being:

> a) the conceptual breadth of a *whistleblower protection issue*, defined in subsection 8(1) of the Bill, and the implications of the breadth of that concept (particularly with respect to the role of the Office of the Commonwealth Ombudsman); and
>
> b) the proposed immunities, set out in Part 4, Division 3 of the Bill, of staff members and persons assisting the Whistleblower Protection Authority (**WPA**); and
>
> c) the remuneration of staff members of the proposed WPA, and the scope of the WPA's role.

[417] Having addressed those three key issues, I addressed a miscellaneous issue in part V, and then, in part VI, suggested that the Legal and Constitutional Affairs Committee consider a more modest set of reforms, in anticipation of root and branch reforms across the Commonwealth's legislative landscape relating to whistleblowing.

[418] Specifically, I have proposed that:

a) an inspector be established for the Commonwealth's public interest disclosure scheme, with a view to the inspector providing an avenue for limited merits review in respect of the Commonwealth Ombudsman's handling of complaints of inadequacies in whistleblower disclosure investigations under the *Public Interest Disclosure Act 2013* (Cth), and

b) the grounds for judicial review, under the ADJR Act, be expanded to include:

> i) decisions, or conduct, or failures of officials exercising powers or functions *Public Interest Disclosure Act 2013* (Cth); or
>
> ii) decisions, or conduct, or failures of the Ombudsman or his officials exercising powers or functions, under the *Ombudsman Act 1976* (Cth) or section 55 of the *Public Interest Disclosure Act 2013* (Cth), in relation to complaints about inadequately investigated whistleblower disclosures under the *Public Interest Disclosure Act 2013* (Cth); and

c) a joint parliamentary committee be established in respect of whistleblower protections and the Commonwealth's whistleblower regime; and

d) a body be established and devoted to funding research into:

> i) the collection, assessment and analysis of case data; and
>
> ii) the dissemination of normative data,

for the purposes of the Commonwealth's integrity system.

COMMONWEALTH OMBUDSMAN

Our ref: 2019-402149

21 September 2020

Professor Peter Tregear
By email to: peter.tregear@gmail.com

Dear Professor Tregear

I am writing to let you know that I have finished investigating your complaint about the Australian National University's (ANU) handling of your public interest disclosure (remade PID 2018-300002)

Broadly, your complaint concerned the adequacy of the ANU's investigation of your disclosure. You raised a number of issues, including:

- the investigator's findings were unreasonable on the basis of the information you provided for the purposes of the investigation
- it was unclear from the investigation report how the investigator assessed your documentary evidence and oral evidence at interview
- the investigation report did not address some of the particulars of your allegations
- the investigator appeared to raise doubts about your credibility in the investigation report

Our role

Our Office's role in assessing a complaint about an agency's handling of a disclosure is to consider whether the agency's actions and decisions were consistent with its obligations under the *Public Interest Disclosure Act 2013* (PID Act) and reasonably open to it. We do not re-investigate the allegations made in the disclosure.

Under the *Ombudsman Act 1976* (Ombudsman Act), we may decide not to continue investigating a complaint where we form the view that further investigation is not warranted in all of the circumstances. A relevant consideration for our Office is whether further investigation of the complaint would be likely to result in a different outcome.

Where we identify flaws in an agency's handling of a disclosure, we may make comments or suggestions to the agency under section 12(4) of the Ombudsman Act. However, we do not have the power to compel an agency to take a particular course of action

Our investigation of your complaint

The ANU engaged an external investigator to investigate your disclosure and to prepare a report for the ANU's consideration. The investigation report records that the investigator reviewed the material you provided in support of your disclosure, conducted a 'desktop review' of numerous documents and emails provided by the ANU, and conducted interviews with 11 witnesses. The investigation report was accepted and adopted by the ANU. At our request, the ANU provided our Office with an unredacted copy of the report and records of witness interviews.

We subsequently requested additional information from the ANU to enable us to better understand what evidence the investigator considered in reaching particular conclusions, and if the investigator did not consider or give weight to certain material or allegations, why. We followed up on our

request on a number of occasions between April and August 2020. The ANU ultimately did not provide a response.

In the circumstances, we decided to progress our investigation of your complaint based on the information available to us. In doing so, we made some observations to the ANU about its investigation of your disclosure. We invited the ANU to provide a response to our comments, but it did not do so.

Although the investigation appears to have been reasonably comprehensive, based on the information we reviewed, we formed the view that the investigation report did not adequately explain the basis for some of the investigator's findings. As the ANU did not provide us with the additional information we requested, it was difficult for us to be satisfied that the investigator's findings were reasonably open.

We also referred the ANU to the procedural fairness requirements discussed in our Office's Agency Guide to the PID Act. We explained that you had raised concerns about the comments '*he is a liar, a manipulator*' and '*untrainable*' having been included in the investigation report. We observed that it was unclear whether you had been given an opportunity to respond to those comments, to the extent that the investigator intended to rely on them. We suggested that if the investigator had not formed an adverse view of your credibility, or if the comments were not materially relevant to the findings of the investigation, it was unclear why they were included in the report.

The ANU did not respond to our observations.

Conclusion

I have decided to finalise my investigation of your complaint at this point, because I do not think that further investigation would be likely to result in a different outcome for you. Our Office will consider whether it is appropriate to make any further comments or suggestions to the ANU under section 12(4) of the Ombudsman Act with a view to improving future administration of the public interest disclosure scheme. I acknowledge that this may not be the outcome you were seeking, but I do not think that further investigation would be likely to achieve a better result.

The PID Act contemplates that a discloser may make an external disclosure if all of the criteria in section 26 have been met. Our Office cannot comment on whether it is open to you to make an external disclosure in all of the circumstances. We recommend that you seek independent legal advice about the options that may be available to you going forward.

If you think I have overlooked something or there is further information I should consider before finalising my investigation of your complaint, please email me at PID@ombudsman.gov.au. If I do not hear from you by **5 October 2020**, I will proceed to finalise my investigation and close your complaint.

Thank you for bringing your concerns to the attention of the Ombudsman's Office

Yours sincerely

By email

Cassandra Hodzic
Investigation Officer
Public Interest Disclosure Team

OFFICIAL

Our ref. 2021-104592

Dear Discloser

I refer to your request for a review of my decision. I note the voluminous nature of your request. We will not be actioning the request as it stands. You are welcome to provide us with 3 pages explaining why you believe the decision was wrong. We can then assess the request and decide whether to conduct a review.

Kind regards

Mark
A/g Assistant Director
Public Interest Disclosure Team
COMMONWEALTH OMBUDSMAN
Phone: 1300 362 072
Email: ombudsman@ombudsman.gov.au
Website: www.ombudsman.gov.au

COMMONWEALTH OMBUDSMAN

Influencing systemic improvement in public administration

From: Discloser (External Disclosure)
Sent: Friday, 10 March 2023 7:49 PM
To: Ombudsman <Ombudsman@ombudsman.gov.au>; Iain Anderson <iain.anderson@ombudsman.gov.au>
Cc: PID <PID@ombudsman.gov.au>; Emma Cotterill <Emma.Cotterill@ombudsman.gov.au>, Katrina Dwyer <katrina.dwyer@ombudsman.gov.au>; Mark Anstey <Mark.Anstey@ombudsman.gov.au>
Subject: [External] Request for review of Mark Anstey's decision: Ombudsman ref: 2021-104592

I – APPLICATION FOR REVIEW

Introduction

[1] On 26 October 2021, I lodged a complaint with the Office of the Commonwealth Ombudsman about the inadequacy of public interest disclosure investigated by Kate McMullan of the Australian Public Service Commission.

[2] On 12 December 2022, 412 days after I lodged my complaint, Mark Anstey, an acting assistant director in the Public Interest Disclosure team of the Office of the Commonwealth Ombudsman, rendered his decision.

[3] This is an application for review of Mark Anstey's decision. [1]

Timeliness of application

[4] According to the website of the Office of the Commonwealth Ombudsman, [2] "[a] request should be made in writing within three months of being told of our final decision." This application has made within three months of Mark Anstey's decision of 12 December 2022.

Where application should be sent

[5] According to the Review information sheet and request form, which is downloadable on the website of the Office of the Commonwealth Ombudsman, [3] a request for review should be sent to ombudsman@ ombudsman.gov.au. I have also copied the following people into this email:

a) Iain Anderson, the Commonwealth Ombudsman, so that he is aware of the request for review and, more importantly, is aware of Mark Anstey's demonstrated incompetence (I will demonstrate that Mark Anstey has an unacceptable command of the *Public Interest Disclosure Act 2013* (Cth), authorities of the High Court and the Full Court of the Federal Court, basic logic and the facts relevant to my complaint),

b) Emma Cotterill, the Senior Assistant Ombudsman responsible for the Public Interest Disclosure team,

c) Katrina Dwyer, the person who was introduced to the Senate's Legal and Constitutional Affairs Legislation Committee as the Acting Director of the Public Interest Disclosure team during the public hearing on the Public Interest Disclosure Amendment (Review) Bill 2022; and

d) Mark Anstey, the acting Assistant Director in the Public Interest Disclosure team, so that he can reflect on his incompetence and use this as an opportunity to advance himself.

Reference number

[6] Mark Anstey noted that the reference number for his decision was "2021-104592".

Contact details

[7] You already have my contact details and they remain the same.

Grounds of review and complaint

[8] In this email, I set out, in parts IV – XI, 8general grounds of review. The grounds of review range from errors of law, including a jurisdictional error on Mark Anstey's part, errors of fact made by Mark Anstey during his investigation under the *Ombudsman Act 1976* (Cth), and other errors.

[9] In part XII, I set out a ground of complaint about the time it took Mark Anstey to provide his decision.

[10] I also set out, in part XIII, specified grounds of review. The grounds of review, being specific to the circumstances relating to the recruitment of registrars of the Federal Court, are organised by reference to each registrar's recruitment.

II – THREE BROAD GROUNDS MARK ANSTEY RELIED ON TO TERMINATE INVESTIGATION UNDER THE OMBUDSMAN ACT 1976 (CTH)

[11] From the outset, I note that Mr Anstey's process of reasoning is meandering and, at times, difficult to make sense of. I also note that Mr Anstey did not identify the power upon which he relied to terminate his investigation under the *Ombudsman Act 1976* (Cth), although, given the context of his record of decision, I assume that Mr Anstey relied on subsection 12(1) of the *Ombudsman Act 1976* (Cth) to terminate his investigation.

[12] Mr Anstey appears to have justified terminating his investigation on three broad grounds.

[13] First, Mr Anstey stated:

> I appreciate that you are likely to be disappointed by the outcome of your complaint given your view there were numerous deficiencies with the investigation of the PID and the resulting report under s 51 of the Public Interest Disclosure Act 2013 (PID Act). It is important to note that our Office cannot take any action that would cause an agency to reinvestigate a PID. This is because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened.

[14] Thus, Mr Anstey terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in his opinion, the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened."

[15] Second, Mr Anstey stated:

> Our Office has broad discretion to decline to further investigate when we consider it is not warranted having regard to all the circumstances. There are various considerations relevant to the exercise of this discretion. One key factor is whether further investigation is likely to result in a practical or otherwise substantive outcome. In this case it is my view there is no practical outcome we could obtain by further investigating the complaint.

[16] Thus, a key factor in Mr Anstey's decision to terminating the investigation under the *Ombudsman Act 1976* (Cth) was his view that no practical outcome could be obtained by further investigation of the complaint.

[17] Third, Mr Anstey states:

> Based on our investigation, which involved seeking copies of internal records from the Investigating Agency and interviewing the PID Investigator, I consider there are several ways in which the PID investigation and associated report could have been improved. That said, as noted below, I found that most of the key findings were not unreasonable for the Investigating Agency to make.

[18] Thus, Mr Anstey terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in his opinion, most of the key finding that Kate McMullan made were not unreasonable for her to make.

III – A SUMMARY OF THE GROUNDS OF REVIEW

[19] Part IV of this email sets out an analysis of why Mark Anstey's claim that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID . because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" is, as a matter of law, nonsense.

[20] Part V of this email sets out an analysis of why Mark Anstey's claim that "no practical outcome" could be obtained by further investigation of the complaint in the inadequacy of Kate McMullan's public interest disclosure investigation is, as a matter of law and as a matter of fact, nonsense.

[21] Part VI of this email sets out, in the light of judgments of the High Court of Australia and the Full Court of the Federal Court of Australia, an analysis of the error of law committed by Mark Anstey when he failed to disclose material information used to make a decision adverse to my rights and interests and, thus, failed to afford me procedural fairness.

[22] Part VII of this email sets out an analysis of Mark Anstey's failure to identify logically probative and relevant evidence that he relied on to make findings of fact and draw conclusions on the way to making his decision to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[23] Part VIII of this email demonstrates Mark Anstey's selective use of materials available to him to support findings that were convenient to him and his preconceived conclusions rather than

addressing and assessing the totality of the materials available to him to make a lawful decision under the *Ombudsman Act 1976* (Cth).

[24] Part IX of this email demonstrates how Mark Anstey went out of his way to ignore specified and well articulated grounds of complaint set out in my correspondence of 26 October 2021, presumably to justify his decision to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[25] Part X of this email sets out an analysis of Mark Anstev's failure to apprehend the relevnat legal standards that applied to his investigation under the *Ombudsman Act 1976* (Cth).

[26] Part XI of this email demonstrates the logical incoherence of Mark Anstey's statements on the reviewability of Kate McMullan's public interest disclosure investigation.

[27] Part XII of this email addresses the sheer inappropriateness of Mark Anstey keeping me waiting 412 days from the date my complaint was made to notify me that, *as a matter of law and independent of the facts of my complaint*, since "the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID", which, as I demonstrate in part IV of this email, as a legal proposition, complete nonsense.

[28] Part XIII of this email sets out grounds of review that are specific to unlawful actions taken by officials in the Federal Court in respect of decisions to engage or "promote" ten registrars of the Federal Court of Australia Part XIII has, for the most part, been prepared to dispel Mark Anstey's conclusions that most of the key finding that Kate McMullan made were not unreasonable for her to make, thus justifying the decision in Mr Anstey's mind to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[29] Much of Part XIII focuses on the evidence that Mark Anstey overlooked during the 412 days that officials in the Office of the Commonwealth Ombudsman faffed about before Mark Anstey decided to terminate the investigation commenced under section 8 of the *Ombudsman Act 1976* (Cth) by Penny McKay, the acting Commonwealth Ombudsman.

IV – GENERAL GROUND OF REVIEW – "REOPENING" A FINALISED PUBLIC INTEREST DISCLOSURE INVESTIGATION

[30] In his record of decision, Mark Anstey stated that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID .. because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened." [4]

[31] To the extent that Mr Anstey is claiming that disclosable conduct set out in a public interest disclosure cannot be reinvestigated, that is demonstrably false.

[32] First, there is nothing in the nature of an administrative decision, such as a decision made under the *Public Interest Disclosure Act 2013* (Cth), which requires a conclusion that a power to make a decision, when purportedly exercised, is necessarily spent: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [5].

[33] As Gleeson CJ noted, the real issue is "whether the statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen": *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [8].

[34] Second, the meaning of the word "investigate" "in relation to a disclosure, means investigate (or reinvestigate) whether there are one or more instances of disclosable conduct": *Public Interest Disclosure Act 2013* (Cth), s 47(2).

[35] Where a person conducting an investigation under the Ombudsman Act 1976 (Cth) finds that a public interest disclosure investigation (or aspect of a public interest disclosure investigation) are inadequate (which, for the reasons set out in the external disclosure report, they were), or that, in some respects, Kate McMullan did not exercise her lawful duty to investigate (which, for the reasons set out in the external disclosure report, happens to be the case), then the duty to investigate a public interest disclosure according to law, which extends to reinvestigation, would be enlivened.

[36] Parliament has explicitly provided powers (to adopt Mr Anstey's choice of terminology) to "reopen" a finalised public interest disclosure investigation because Parliament has, in the relevant Part and Division of the Public Interest Disclosure Act 2013 (Cth), explicitly defined the word "investigate" as meaning "reinvestigate" "one or more instances of disclosable conduct".

[37] Third, there is nothing in the *Public Interest Disclosure Act 2013* (Cth) that prohibits the re-investigation of a public interest disclosure because the original investigation was inadequate in law. On the contrary, the *Public Interest Disclosure Act 2013* (Cth) makes quite clear that one of its fundamental objects is to ensure that disclosures made by public officials are to be properly investigated and dealt with: *Public Interest Disclosure Act 2013* (Cth), s 6(d) It would be contrary to this object to infer that the re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is prohibited, particularly when the original investigation conducted by Kate McMullan is affected by legal errors, including errors that go to jurisdiction. Indeed, the inference to be drawn, in the light of the cannons of statutory interpretation, is that re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is not only permitted, but encouraged because a fundamental object of the *Public Interest Disclosure Act 2013* (Cth) is to ensure that disclosures made by public officials are to be properly investigated and dealt with. To permit a disclosure to remain improperly investigated and improperly dealt with would be to actively defeat a fundamental object of the *Public Interest Disclosure Act 2013* (Cth)

[38] Fourth, the claim that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure]" is demonstrably false because it is well within the Ombudsman's power to, along with any report issued under section 15 of the *Ombudsman Act 1976* (Cth) to the Australian Public Service Commission, include "any recommendations he or she thinks fit", which would extend to a recommendation to the Australian Public Service Commissioner to ensure that the public interest disclosure is properly investigated and dealt with. Practically speaking, were Mark Anstey to, under section 15 of the *Ombudsman Act 1976*, provide a report to the Australian Public Service Commissioner setting out the patent inadequacies of Kate McMullan's PID investigation, and provide recommendations for reinvestigation of the disclosable conduct identified in my public interest disclosure disclosure, then the Australian Public Service Commissioner would be, by the force of section 15 of the *Ombudsman Act 1976*, given cause to conduct a proper and, by extension, lawful investigation (an investigation that is not inadequate).

[39] I hasten to add that just because officials in the Office of the Commonwealth Ombudsman may not be able to *compel* the Australian Public Service Commissioner or his staff to re-investigate a public interest disclosure is not to say that the Commonwealth Ombudsman (or his officials) "cannot take any action that would cause an agency to re-investigate a PID " The power to compel a particular course of action does not exhaust the Commonwealth Ombudsman's ability to take action that would cause an agency to re-investigate a public interest disclosure. Were this the case, then the entire concept of lodging complaints with the Office of the Commonwealth Ombudsman in respect of an agency's failure to conduct a lawful public interest disclosure investigation would be feckless.

[40] In conclusion, that Mr Anstey has decided to terminate his investigation because he believes the Commonwealth Ombudsman (or his officials) "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" demonstrates how misconceived and incorrect Mark's decision to terminate his investigation is because, plainly:

a) the definition of investigating disclosable conduct set out in a public interest disclosure extends to the reinvestigation of disclosable conduct set out in a public interest disclosure; and

b) the Commonwealth Ombudsman (or his officials) can take action that would cause an agency to reinvestigate a public interest disclosure.

[41] Indeed, where the Commonwealth Ombudsman or his officials find that an investigation is inadequate, the Commonwealth Ombudsman and his officials must take such action that would give effect to the Parliamentary mandate that disclosures made by public officials are to properly investigated and dealt with

[42] Mark Anstey is claiming that once a public interest disclosure investigation is finalised, regardless of whether the decision or the processes adopted are lawful, the disclosable conduct set out in the internal disclosure cannot, as a matter of law, be reinvestigated "because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened."

[43] The implication of Mr Anstey's claim that a public interest disclosure cannot be reinvestigated "because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" is that, in the last decade, during which the *Public Interest Disclosure Act 2013* (Cth) has not been substantively amended, there has never been "a mechanism for a finalised PID investigation to be reopened." Is the Australian community to understand that in the last decade, right or wrong, deficient, inadequate or otherwise, once a public interest disclosure investigation was finalised, there was simply no "mechanism for a finalised PID investigation to be reopened", such that a deficient or inadequate investigation was final and binding?

[44] What is the point of having a right to complain to the Office of the Commonwealth Ombudsman about the inadequacy of a public interest disclosure investigation if the legal position is, as Mark Anstey erroneously claims it to be, that a public interest disclosure cannot be reinvestigated "because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened"? In the light of the *Public Interest Disclosure Act 2013* (Cth) and the judgments of the High Court of Australia, the idiocy and unjustifiability manifested in the conclusion, which Mark Anstey took 412 days to come up with, are patent.

V – GENERAL GROUND OF REVIEW – NO "PRACTICAL OUTCOME" IN INVESTIGATING INADEQUATE PUBLIC INTEREST DISCLOSURE

[45] In his record of decision, Mark Anstey stated that it was his view that no practical outcome could be obtained by further investigation of the complaint into the inadequacy of Kate McMullan's public interest disclosure investigation.[5] That is nonsense.

[46] The practical outcome of the further investigation of the complaint under the *Ombudsman Act 1976* (Cth) would be to ensure that public officials at the Australian Public Service Commission are made aware of the patent inadequacies of Ms McMullan's PID investigation, and that, as a result of their recognition of Ms McMullan's failures, officials in the Australian Public Service Commission make sure, following Mr Anstey's recommendation (under section 15 of the *Ombudsman Act 1976*) to investigate the public interest disclosure because Kate McMullan's investigation was inadequate, that the internal disclosure is properly investigated and dealt with according to law because Parliament has mandated that disclosures by public officials are to be properly investigated and dealt with: *Public Interest Disclosure Act 2013* (Cth), s 6(d).

[47] I also note that talk of practicality is misplaced. Practicality is a subordinate consideration. Legality is what Mark should have directed his mind to. Parliament has mandated that disclosures by public officials are to be properly investigated and dealt with. In terminating the investigation he was conducting under section 8 of the *Ombudsman Act 1976* (Cth), all Mark Anstey has ensured is that the internal disclosure that was allocated to the Australian Public Service Commission, on 11 May 2020, by Elizabeth Bennet of the Office of the Commonwealth Ombudsman will not be properly investigated and dealt with In other words, in deciding to abort his investigation under section 8 of the *Ombudsman Act 1976* (Cth) because continuing with the investigation is "not warranted having regard to all the circumstances", Mr Anstey has undermined an express object of the *Public Interest Disclosure Act 2013* (Cth) – the Parliamentary mandate that disclosures by public officials are to be properly investigated and dealt with.

VI – GENERAL GROUND OF REVIEW – FAILURE TO DISCLOSE MATERIAL INFORMATION USED TO MAKE ADVERSE DECISION

Disclosure of information as a fundamental manifestation of procedural fairness

[48] In ***SZBEL*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, a unanimous High Court stated:[6]

COMMONWEALTH OMBUDSMAN

Ombudsman ref: 2021-104592

12 December 2022

By email: [redacted]

Dear Discloser

I refer to your complaint of 26 October 2021 about the handling of a public interest disclosure (PID) by the agency who investigated the PID (the Investigating Agency).

I apologise for the time it has taken to complete our investigation of this matter. This was unavoidable due to the volume of material, the relative complexity of the matter, and the need to change case officers during our investigation. Thank you for your patience.

After considering the information provided by you and the Investigating Agency I have decided to finalise our investigation at this point.

Our Office has broad discretion to decline to further investigate when we consider it is not warranted having regard to all the circumstances. There are various considerations relevant to the exercise of this discretion. One key factor is whether further investigation is likely to result in a practical or otherwise substantive outcome. In this case it is my view there is no practical outcome we could obtain by further investigating the complaint.

When finalising investigations we conduct under the *Ombudsman Act 1976* we may provide comments and suggestions to agencies. We use this power to fulfil our broader role to seek to influence systemic improvement in government administration, including best practice administration of the Public Interest Disclosure (PID) scheme. When finalising this investigation with the Investigating Agency we intend to provide feedback about how it could improve its handling of PIDs in future.

I appreciate that you are likely to be disappointed by the outcome of your complaint given your view there were numerous deficiencies with the investigation of the PID and the resulting report under s 51 of the *Public Interest Disclosure Act 2013* (PID Act). It is important to note that our Office cannot take any action that would cause an agency to reinvestigate a PID. This is because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened.

Our investigation is also not a reinvestigation of your disclosure. Rather, our investigation of a complaint of this kind focuses on the actions the agency took to investigate and finalise a PID, and whether those actions met the requirements of the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard).

The PID investigation you complained about concerned recruitment processes and decisions made by a Commonwealth agency. Based on our investigation, which involved seeking copies of internal records from the Investigating Agency and interviewing the PID Investigator, I consider there are several ways in which the PID investigation and associated report could have been improved. That

said, as noted below, I found that most of the key findings were not unreasonable for the Investigating Agency to make.

In completing this investigation I considered all the material you provided and the views raised in your correspondence with our Office. My assessment of what I consider to be the key issues raised by your complaint can be found under the headings below.

Record keeping

In my view, the PID Investigator did not create adequate investigation records for this matter or, alternatively, the Investigating Agency did not maintain relevant records. While the PID Act does not require investigators to make separate investigation records when conducting investigations under the PID Act our Office considers it best practice to do so. This is reflected in our Agency Guide to the PID Act (see paragraphs: 7.3.3.2, 7.3.3.5, and 7.5.2). We will be providing feedback to the Investigating Agency on this point.

Broadbanding and EL2 appointments

I note your view the PID Investigator failed to address a key legal issue at the start of the investigation – this being the holding of a role at SES1 and EL2 classifications. As I understand it, you were concerned the implication of the PID investigation report was that *"it is acceptable for broadbanding arrangements to extend to SES classification"*. As you noted, there is no broadbanding between EL classifications and SES.

As you would be aware, broadbanding allows an employee to progress in classification without needing to apply for an advertised role at the higher level. The Australian Public Service Commission's (APSC) current APS Classification Guide states, *'Broad-banding removes the need for open, competitive selection processes between each of the APS classification levels within the broadband'* (at 34). While I acknowledge your views, what happened in this case does not appear to be a case of unlawful broadbanding – this being broadbanding between EL and SES classifications. In your complaint you said the records indicated a *"proposition that the ... role could bear a classification of both Executive Level 2 and SES Band 1"*. In my view, it appears the agency decided the position could have a classification of *either* EL2 or SES, depending on the requirements of the specific role.

The APSC's Australian Public Service Classification Guide explains *'The essential function of the classification framework is to group together jobs with similar features of work value, based on the level of complexity and depth of responsibility expected. It also assists with managing the workforce in that employees can be matched to clearly identified jobs.'* This means that, depending on the level of complexity and depth of responsibility expected, similarly titled roles can have different classifications.

The arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process. As the Investigator noted, a decision was made that *'the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)'* due to an assessment about the differing volume and complexity of work in each registry. This does not appear to be a case of unlawful broadbanding. I accept the report could have provided more detail about how this alleged issue was assessed. However, the PID Investigator did not fail to identify and consider the issue.

Related to the PID Investigator's alleged failure to properly consider this alleged unlawful broadbanding was your complaint the recruitment process inappropriately sought to avoid a cap that may have been placed on the number of positions to be offered at each level. In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of 'getting around' a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level. Unlike the entitlements that attach to permanent appointments to the APS a person's IFA can be terminated at any time, including if it ceases to meet a genuine operational need. This is consistent with the accepted practice that agencies can use labour hire staff to meet genuine operational needs at considerably higher cost than permanent or non-ongoing staff so long as these actions are commensurate with relevant requirements under the *Public Governance, Performance and Accountability Act* (the PGPA Act).

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2002 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved 'at level' to a different role at the same EL2 level.

Role Review

Further to the above I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made *"on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)"*. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

NSW Appointment

Due to insufficient investigation records having been retained by the Investigating agency we cannot confirm the PID Investigator identified and considered if there had been a failure to advertise in NSW

for the SES1 appointment that was subsequently made in NSW. We will provide feedback to the Investigating Agency on this point.

Alleged targeting of particular applicants

In my view, it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level. I agree with the PID investigator's conclusion that the primary lesson to learn from this part of the recruitment process was that the agency should have more clearly communicated with staff about the role review process and what led to the decision to classify certain roles at either EL2 or SES level.

Finding the agency engaged in disclosable conduct

You raised concern a finding was made that the agency breached the Code of Conduct and individual findings were not made. You asserted the finding the agency engaged in disclosable conduct arguably carried with it an implication that certain officers may have engaged in disclosable conduct. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered this issue. We will be providing feedback to the agency on these points.

Allegation that another appointee was unmeritorious / lacked essential criteria

You alleged one candidate's appointment was unmeritorious because the appointee did not possess one of the criteria listed as an essential requirement for the position. You maintained this position notwithstanding the fact the individual obtained this essential requirement within a short period of being appointed.

As part of this investigation we sought advice from the APSC in its capacity as the agency with policy responsibility in this area. The APSC, in this capacity, advised that an agency can appoint a person in these circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period.

While I appreciate that you may have a different view on this, the PID Investigator's finding that disclosable conduct did not occur aligns with the view of the agency with policy responsibility in this area.

I note your view the alleged favouritism shown to that appointee was first present during the shortlisting process. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered the shortlisting process itself as part of the investigation of the PID. We will provide feedback to the Investigating Agency on these points.

PID report

I acknowledge your dissatisfaction with the s 51 report. I agree it lacked one key feature our Office expects a s 51 report to contain. Specifically, while it noted the conclusions drawn were based *"on the materials before me"*, in our view, principles of good administration and the PID Standard require the summary of evidence in the report include a discussion of the content of the evidence obtained,

the investigator's assessment of that evidence (for example, whether it is credible, consistent and compelling) and how the evidence shaped the investigator's conclusions. We will provide feedback to the Investigating Agency on this point.

Final comments

In my view, while the internal record keeping could have been more robust and the PID report could have contained further detail about the investigation undertaken and the evidence considered, I cannot conclude that the findings of the PID Investigator were clearly unreasonable.

In these circumstances, I have decided that further investigation is not warranted, and the investigation of your complaint is now finalised. I appreciate that you may be disappointed with the decision to finalise the investigation of your complaint. Nevertheless, I do not believe there is any practical outcome we could obtain by further investigating the complaint.

As I have explained, we intend to provide feedback to the agency about the issues identified in our investigation.

Thank you for bringing your concerns to the attention of the Commonwealth Ombudsman's Office.

Yours faithfully

Mark
A/g Assistant Director